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Vol. I

TRANSCRIPT OF RECORD

(Pages 1 to 830)

Supreme Court of the United States

OCTOBER TERM, 1947

No. 10

SCHINE CHAIN THEATRES, INC., ET AL.,
APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

FILED OCTOBER 4, 1946.

SUPREME COURT OF THE UNITED STATES

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

VOL. I

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388	Letter dated February 1, 1938 from W. B. Kraemer to F. J. A. McCarthy, Universal Film Exchanges, Inc., Rockefeller Center, N. Y	6113	3899
389	Letter dated February 7, 1938 from P. T. Dana, Branch Manager, to A. J. Herman, District Manager	6114	3899
390	Letter dated February 15, 1938 from L. Goldstein, Schine Circuit, Inc., to Nate Sauber, Buffalo, N. Y.	6116	3901
391	Inter-office letter dated November 14, 1938, from Paul Baron, Acting Branch Manager, Washington, to A. J. Herman, Home Office	6117	3901
392	Letter dated December 14, 1938 from F. J. A. McCarthy to Paul Baron, Washington Exchange	6118	3902
393	Cancellation or Alteration of Contract dated December 15, 1938, Roxy Theatre, Corbin, Kentucky; also Contract dated January 13, 1939, Hippodrome and Kentucky Theatres, Corbin, Ky	6119	3902
396	Inter-office letter dated May 23, 1939 from John J. Scully, Branch Manager, to F. J. A. McCarthy, Eastern Sales Manager, Home Office; also attached memorandum dated May 19, 1939 from F. J. A. McCarthy to J. J. Scully, Buffalo, Exchange	6120	3903
397	Letter dated June 8, 1939 from B. B. Kreisler, Branch Manager, Washington, to F. J. A. McCarthy, Eastern Division Manager	6123	3905
409	Letter, P. T. Dana to Frank McCarthy, September 23, 1935	6124	3907
412	Letter of September 10, 1932 from G. V. Lynch, Schine Enterprises, Inc., Gloversville, N. Y., by Jack E. Flynn, MGM Corp., Detroit, Michigan	6125	3907
413	Letter of September 12, 1932 from Jack E. Flynn, MGM to Cincinnati, Ohio, branch office, and Geo. V. Flynn, Schine Enterprises, Inc., Gloversville, N. Y.	6126	3908
424	Inter-office memorandum on MGM Distributing Corp. letterhead, dated October 13, 1933 from E. K. O'Shea to W. F. Rodgers	6128	3909

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		Original	Print
425	Letter dated October 21, 1933 from G. V. Lynch to Jack Flynn	6129	3910
426	Inter-office memorandum on MGM Distributing Corp. letterhead, dated January 4, 1934, from Ralph Pielow to J. E. Flynn	6130	3911
430	Inter-office memorandum on MGM Distributing Corp. letterhead, dated August 1, 1935, from Ralph Pielow to J. E. Flynn	6131	3912
433	Letter dated August 26, 1935, from G. V. Lynch to Ralph Pielow	6132	3913
435	Letter dated September 27, 1935 from G. V. Lynch to Ralph Pielow	6133	3913
441	Unsigned letter (WFR) to G. V. Lynch dated February 7, 1936	6134	3914
444	Inter-office memorandum on Metro-Goldwyn-Mayer Distributing Corporation letter head, dated June 15, 1936, from E. K. O'Shea to J. E. Flynn	6135	3915
455	Inter-office letter dated August 28, 1937 (E. K. O'S) to E. M. Booth	6136	3916
456	Inter-office memorandum dated August 30, 1937, from E. M. Booth to E. K. O'Shea	6137	3917
457	Unsigned letter dated September 1, 1937 (EKO'S) to E. M. Booth	6138	3918
459	Inter-office communication dated November 1, 1937 from E. M. Booth to E. K. O'Shea	6139	3919
476	Letter dated July 13, 1938, G. V. Lynch to Ralph Maw, Buffalo, New York	6140	3920
488	Inter-office memorandum dated May 15, 1939, from R. W. Maw, Buffalo, New York to E. K. O'Shea	6141	3920
491	Inter-office memorandum dated June 8, 1939, from W. F. Rodgers to T. J. Connors	6143	3923
494	Inter-office memorandum dated November 7, 1935, from Ralph Pielow to J. E. Flynn, Detroit, Michigan	6144	3924
496	Letter dated February 28, 1936, from E. W. Aaron to Ralph Pielow	6145	3925
497	Inter-office memorandum from Ralph Pielow. Albany, New York, to J. E. Flynn, Cincinnati, Ohio, dated November 30, 1936	6146	3925
499	Letter from Mr. G. V. Lynch, Schine Theatre Enterprises, to Mr. F. Drew, Metro-Goldwyn-Mayer Pictures, Cleveland, Ohio	6147	3926
500	Telegram, G. V. Lynch to J. E. Flynn, Metro-Goldwyn-Mayer Pictures, at Detroit, Michigan	6148	3927
509	Memorandum from E. W. Aaron, Loew's, Inc., to W. F. Rodgers, dated August 2, 1938	6149	3927
510	Letter, W. F. Rodgers to T. J. Connors, dated July 29, 1938	6150	3928
511	Letter, T. J. Connors to Essick and Fine, dated December 7, 1938	6151	3929

EXHIBITS PRINTED IN FULL—Continued

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518	Inter-office memorandum dated September 16, 1932, from C. R. Halligan, Branch Manager, Albany, to E. L. McEvoy, Home Office	6152	3929
519	Inter-office letter, dated October 17, 1933, from C. R. Halligan, Branch Manager, Albany, N. Y., to E. L. McEvoy, Home Office	6155	3932
520	Agreement, dated September 22, 1933, between the Schine Theatrical Co., Inc., and the RKO Distributing Corp	6157	3933
524	Agreement, dated October 29, 1934, between Schine Theatrical Co., Inc., and RKO Distributing Corp.	6158	3935
526	Inter-office letter from H. T. Dixon, Branch Manager, Buffalo, N. Y., to E. L. McEvoy, Eastern Sales Manager, dated January 8, 1935	6159	3936
527	Letter from E. L. McEvoy, Eastern Sales Manager, to Harry Dixon, Buffalo, N. Y., dated January 10, 1935	6160	3937
528	Inter-office letter from H. T. Dixon, Buffalo, N. Y., to E. L. McEvoy, Eastern Sales Manager, dated February 18, 1935	6161	3937
530	Contract Modification, Palace Theatre, Corning, N. Y., dated December 11, 1935	6162	3938
539	Inter-office communication, dated September 10, 1932, from S. B. Kramer, Branch Manager, Cleveland, Ohio to A. W. Smith, Jr., Home Office.	6163	3939
542	Inter-office letter, dated January 12, 1934, from R. S. Smith, Branch Manager, Albany, N. Y., to A. W. Smith, Jr., Home Office	6164	3940
546	Inter-office communication, dated June 25, 1934 from R. S. Smith, Branch Manager, to A. W. Smith, Jr., Home Office	6166	3941
549	Inter-office letter, dated August 31, 1934, from R. S. Smith, Branch Manager, to R. Mochrie, Home Office	6167	3942
550	Inter-office letter, dated September 1, 1934, from H. A. Seed, Branch Manager, Buffalo, N. Y., to A. W. Smith, Jr., Home Office	6168	3943
554	Inter-office communication, dated February 26, 1935, from R. S. Smith, Branch Manager, Albany, N. Y., to A. W. Smith, Jr., Home Office	6170	3945
559	Inter-office communication from M. A. Mooney to R. Mochris, dated December 27, 1935	6171	3946
560	Carbon copy of telegram from A. W. Smith, Jr., Home Office to Mooney, Vitagraph, dated March 25, 1936	6172	3947
561	Carbon copy of telegram from Mochrie to Mooney, dated April 1, 1936	6173	3947
566	Contract recommendation signed M. A. Mooney, dated September 16, 1936	6174	3948

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		Original	Print
567	Carbon copy of Contract Recommendation with Belpik Theatres, Inc., dated October 21, 1936	6175	3948
574	Contract recommendation dated June 22, 1937	6176	3948
597	Inter-office letter dated December 9, 1940, from Arthur Sachson, Home Office, to R. H. Dunbar, Cincinnati	6178	3949
598	Inter-office letter dated December 13, 1940, from Branch Manager, (RHD), Cincinnati, to Arthur Sachson, Home Office	6179	3949
599	Inter-office letter dated December 20, 1940, from Arthur Sachson, Home Office, to R. H. Dunbar, Cincinnati	6180	3950
600	Inter-office letter dated December 23, 1940, from Branch Manager, (RHD), Cincinnati, to Arthur Sachson, Home Office	6181	3951
601	Letter dated December 27, 1940, from Arthur Sachson to Geo. V. Lynch, Schine Circuit	6182	3951
602	Inter-office letter dated September 5, 1941, from R. H. Dunbar, Branch Manager, Cincinnati to S. W. Hatch, Home Office	6182a	3952
618	Loew's franchise (10/1/36) letters and deal sheets	6184	3952
619	Metro-Goldwyn-Mayer release schedules	6246	3998
634	RKO release schedules	6282	4078
645	Warner release schedules	6296	4109
648	Agreement, Medina Temple Theatre Company and Schine Medina Corp., 2/28/39	6306	4143
648A	Copy of lease of Princess, Medina, dated April 1, 1937	6327	4160
649	Letter, 5/5/33, O'Shea to Grafiades	6333	4167
650	Letter, 5/8/33, Universal (Sauber) to Grafiades	6334	4168
651	Letter, 5/16/33, Robinson (Para) to Grafiades	6335	4169
652	Letter, 6/1/33, Paramount (Unger) to Grafiades	6336	4170
653	Letter, 6/28/33, M. G. M. (Rodgers) to Grafiades	6337	4170
662	Columbia contracts	6338	4172
682	Columbia release schedules	6340	4173
685 (A to Y)	Columbia release schedules for 1938–1939 to 1941–1942 seasons	6345a	4186
686	List of Columbia release dates	6345c	4186
687	List of Paramount release dates supplied by Morgan	6346	4228
688	Contract, 6/17/35, unsigned, Shannon et al. and G. C. Theatre Corporation	6359	4248
690	Notice of sale of Dickinson Estate assets	6369	4254
691	Memorandum, 4/20/36, Shannon et al. and Dipson et al.	6371	4256
704 (A to W)	Distribution statistics	6377a	4261
717	Release schedule 1919–1941 (United Artists)	6378	4285
718 (A to I)	Distribution statistics	6400a	4296
719	Answers of United Artists Corp. to interrogatories 15 and 16	6402	4314
765	Letter, 4/9/37, Fenyvessy to Rodgers	6411	4328

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773	Letter, 8/3/38, Fenyvessy to Maw	6412	4328
774	Letter, 8/11/38, O'Shea to Fenyvessy	6413	4329
775	Letter, 8/16/38, Fenyvessy to O'Shea	6414	4330
776	Letter, 8/16/38, Maw to Fenyvessy	6415	4330
790	Non-competitive agreement, C. & D. Fenyvessy to Munmad	6416	4331
800	Letter, 10/4/38, Belinson to Wm. Rodgers Metro	6418	4332
801	Letter, 10/9/39, Rodgers to Belinson	6420	4333
802	Letter, 9/12/40, O'Shea to Belinson	6421	4334
805	Telegram, 5/10/38, Jenkins to Lauer	6422	4335
812	Lease, Syracuse-Strand to Syracuse Commun. Theatre Co., 9/11/41	6423	4335
818	Memorandum containing deal offered by Fox to Wallace	6451	4353
820	Telegram, RKO to Strand, 9/18/41	6454	4355
823	Agreement, 9/15/39, re Paris, Schine Lexington and Southland, Charles and Harry Schwartz	6455	4355
824	Letter, Fox to Schwartz, 11/17/38	6463	4360
825	Letter, RKO to Schwartz, 11/7/38	6464	4360
826	Letter, Universal to Schwartz, 11/10/38	6465	4361
828	Agreement, 9/15/39, re Opera House, Schine Lexington and Southland, Charles and Harry Schwartz	6466	4362
832	List of playoffs at Empire, Syracuse, beginning 9/12/41 to 2/10/42	6484	4374
834	Letter, Warner to Vournakis, 7/16/34	6486	4375
845	Agreement, 9/20/39, Lynch and Vournakis	6488	4376
846	Copy of affidavit of P. Vournakis, 9/20/39	6489	4376
864	Letter, Boumansour to Grassgreen	6490	4377
873	Rider attached to Fox contract, 4/20/35	6491	4378
879	Certified copy of Minutes of Common Council, Ogdensburg, 9/4/40	6492	4378
882	Letter enclosing copy of proposed lease, 9/30/40	6495	4380
886	Letter, 11/4/33, Warners (A. W. S.) to Smalley and attached copy of letter to O. W. Van Horne, 11/1/33	6496	4381
887	Letter, 8/9/34, Smalley to Smith and reply	6498	4382
888	Wire, 5/22/34, Smalley to Smith and reply letter	6500	4383
889	Letter, Strumer (United Artists) to Smalley, 7/27/33	6503	4384
891	Letter, Smalley to Lichtman, 8/9/34, and reply 8/14/34	6504	4385
892	Letter, Smalley to Streimer, 11/2/33, and reply 11/4/33	6506	4386
893	Letter, Smalley to Streimer, 11/9/33	6507	4387
894	Letter, Streimer to Smalley, 11/11/33	6508	4387
896	Telegram, 6/26/33, Van Horne to Sauber (Universal) and reply 7/10/33	6509	4388
897	Letter, 11/2/33, Smalley to Sauber and reply 11/4/33	6512	4389
899	Telegram, 5/27/40, Smalley to Columbia	6514	4390

EXHIBITS PRINTED IN FULL—Continued

		Original	Print
900	Copy of letter 12/4/39, Smalley to Moross, Columbia. Answers letter of 11/13	6516	4391
901	Telegram, 5/4/39, Montague to Van Horne	6517	4391
902	Telegram, 5/2/39, Smalley to Montague	6518	4392
903	United Artists Clearance schedule 1940–41	6520	4392
958–959	United Artists Clearance schedules	6520a	4393

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980	Deal sheet bearing date 9/20/23	6521	4399
985	Letter, G–C Theatre Corp. to Bates Estate, 6/30/41	6525	4399
986	Stipulation re play-off of Paramount pictures in Auburn, N. Y.	6526	4400
987	Stipulation re gross film rentals received by Fox from Schine, for seasons 1935–36 through 1939–40	6536	4405
988	Same stipulation re Loew's Inc., film rentals for periods ending 8/27/36, 8/26/37, 9/1/38, 8/31/39 and 8/29/40	6537	4406
989	Same for Paramount—seasons 1934–35 through 1939–40	6538	4407
990	Same for RKO—seasons 1935–36 through 1939–40	6539	4408
991	Same for Vitagraph, Inc.—seasons 1934–35 through 1939–40	6540	4408
992	Stipulation re Universal Picture Co., Inc. Positions of J. M. Schine and W. S. McKay with respect to Universal	6541	4409
993	Stipulation re servicing of prints to Schine theatres from various exchanges	6543	4410
994	Stipulation re operating companies which operate various Schine theatres listed in answer to Int. 15 referred to in par. 2 of subpoena returnable 10/2/44	6544	4411
999	Letter, 10/28/35, Miller to Lynch, cc. McCarthy re Van Wert and Bucyrus	6549	4414
1004	Agreement, 10/3/35, B. F. Keith Corp., Dom. Op. Co. Ltd., and SK. E. Op. Co. Ltd.	6550	4415
1005	Agreement, 7/31/39, B. F. Keith Corp., Dom. Op. Co. Ltd. and S. K. E. Op. Co., Ltd.	6561	4422
1006	Letter, Masonic Temple Co. to J. M. Schine, 3/25/37	6566	4425
1007	Letter, Morgan (Para) to Marcus, 10/26/44	6568	4427
1009	Clearance Schedule, Universal and Schine 1936–37 season	6570	4428
W3	Agreement, Vitagraph, Inc. and Schine, 8/22/38	6571	4429
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W4(2)	Deal sheet, second run, Amsterdam, N. Y., 9/28/37	6607	4457
W4(3)	Deal sheet, first run, Ballston, N. Y., 9/28/37	6608	4458
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		Original	Print
W4(5)	Deal sheet, first run, Glens Falls, N. Y., 9/28/37	6610	4460
W4(6)	Deal sheet, second run, Glens Falls, N. Y., 9/28/37	6611	4461
W4(7)	Deal sheet, first run, Glover ville, N. Y., 9/28/37	6612	4462
W4(8)	Deal sheet, second run, Gloversville, N. Y., 9/28/37	6613	4463
W4(9)	Deal sheet, first run, Granville, N. Y., 12/16/38	6614	4464
W4(10)	Deal sheet, first run, Granville, N. Y., 12/16/38	6615	4465
W4(11)	Deal sheet, first run, Hamilton, N. Y., 9/28/37	6616	4466
W4(12)	Deal sheet, first run, Herkimer, N. Y., 9/28/37	6617	4467
W4(13)	Deal sheet, first run, Hudson Falls, N. Y., 9/28/37	6618	4468
W4(14)	Deal sheet, first run, Ilion, N. Y., 9/28/37	6619	4469
W4(15)	Deal sheet, first run, Little Falls, N. Y., 9/28/37	6620	4470
W4(16)	Deal sheet, first run, Malone, N. Y., 9/28/37	6621	4471
W4(17)	Deal sheet, first run, Massena, N. Y., 9/28/37	6622	4472
W4(18)	Deal sheet, first run, Mechanicville, N. Y., 9/28/37	6623	4473
W4(19)	Deal sheet, first run, Norwich, N. Y., undated	6624	4474
W4(20)	Deal sheet, first run, Norwich N. Y., 9/28/37	6625	4475
W4(21)	Deal sheet, first run Ogdensburg, N. Y., 8/22/38	6626	4476
W4(22)	Deal sheet, first run, Ogdensburg, N. Y., 9/28/37	6627	4477
W4(23)	Deal sheet, first run, Oneonta, N. Y., undated	6628	4478
W4(24)	Deal sheet, first run, Oneonta, N. Y., 9/28/37	6629	4479
W4(25)	Deal sheet, first run, Saranac Lake, N. Y., 9/28/37	6630	4480
W4(26)	Deal sheet, first run, Tupper Lake, N. Y., 9/28/37	6631	4481
W4(27)	Deal sheet, first run, Whitehall, N. Y., 9/28/37	6632	4482
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W4(30)	Deal sheet, first run, Ashland, Ohio, 9/28/37	6635	4485
W4(31)	Deal sheet, first run, Bowling Green, O., 11/2/39	6636	4486
W4(32)	Deal sheet, first run, Bucyrus, O., 9/28/37	6637	4487
W4(33)	Deal sheet, first run, Delaware, O., 9/28/37	6638	4488
W4(34)	Deal sheet, first run, Fostoria, O., 9/28/37	6639	4489
W4(35)	Deal sheet, first run, Kent or Ravenna, O., 9/28/37	6640	4490
W4(36)	Deal sheet, repeat run, Kent or Ravenna, O., 9/28/37	6641	4491
W4(37)	Deal sheet, first run, Medina, Ohio, 9/28/37	6642	4492
W4(38)	Deal sheet, first run, Norwalk, Ohio, 9/28/37	6643	4493
W4(39)	Deal sheet, first run, Shelby, Ohio, 9/28/37	6644	4494
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		Original	Print
W4(42)	Deal sheet, first run, Wooster, Ohio, 9/28/37	6647	4497
W4(43)	Deal sheet, first run, Auburn, N. Y., 9/28/37	6648	4498
W4(44)	Deal sheet, second run, Auburn, N. Y., 9/28/37	6649	4499
W4(45)	Deal sheet, second run, Auburn, N. Y., 3/6/39	6650	4500
W4(46)	Deal sheet, first run, Bath, N. Y., 9/28/37	6651	4501
W4(47)	Deal sheet, first run, Buffalo, N. Y., 9/28/37	6652	4502
W4(48)	Deal sheet, first run, Buffalo, N. Y., 9/28/37	6653	4503
W4(49)	Deal sheet, first run, Canandaigua, N. Y., 9/28/37	6654	4504
W4(50)	Deal sheet, first run, Corning, N. Y., 9/28/37	6655	4505
W4(51)	Deal sheet, second run, Corning, N. Y., 9/28/37	6656	4506
W4(52)	Deal sheet, first run, Cortland, N. Y., 9/28/37	6657	4507
W4(53)	Deal sheet, second run, Cortland, N. Y., 9/41/40	6658	4508
W4(54)	Deal sheet, first run, East Rochester or Fairport, N. Y., 11/2/39	6659	4509
W4(55)	Deal sheet, second run, East Rochester or Fairport, N. Y., 11/2/39	6660	4510
W4(56)	Deal sheet, first run, Geneva, N. Y., 9/28/37	6661	4511
W4(57)	Deal sheet, second run, Geneva, N. Y., 1/16/39	6662	4512
W4(58)	Deal sheet, first run, Lockport, N. Y., 9/28/37	6663	4513
W4(59)	Deal sheet, second run, Lockport, N. Y., 9/28/37	6664	4514
W4(60)	Deal sheet, first run, Newark, N. Y., 9/28/37	6665	4515
W4(61)	Deal sheet, first run, Oswego, N. Y., 9/28/37	6666	4516
W4(62)	Deal sheet, second run, Oswego, N. Y., 9/28/37	6667	4517
W4(63)	Deal sheet, first run, Penn Yan, N. Y., 9/28/37	6668	4518
W4(64)	Deal sheet, first run, Perry, N. Y., 9/28/37	6669	4519
W4(65)	Deal sheet, first run, Rochester, N. Y., 9/28/37	6670	4520
W4(66)	Deal sheet, first run, Rochester, N. Y., 9/28/37	6671	4521
W4(67)	Deal sheet, first run, Rochester, N. Y., 9/28/37	6672	4522
W4(68)	Deal sheet, first run, Rochester, N. Y., 3/23/39	6673	4523
W4(69)	Deal sheet, first run, Rochester, N. Y., 3/23/39	6674	4524
W4(70)	Deal sheet, third run, Rochester, N. Y., 9/28/37	6675	4525
W4(71)	Deal sheet, repeat run, Rochester, N. Y., 9/28/37	6676	4526
W4(72)	Deal sheet, third run, Rochester, N. Y., 9/28/37	6677	4527
W4(73)	Deal sheet, repeat run, Rochester, N. Y., 9/28/37	6678	4528
W4(74)	Deal sheet, first run, Rochester, N. Y., 3/23/39	6679	4529
W4(75)	Deal sheet, first run, Salamanca, N. Y., 9/28/37	6680	4530
W4(76)	Deal sheet, first run, Seneca Falls, N. Y., 9/28/37	6681	4531
W4(77)	Deal sheet, first run, Syracuse, N. Y., 11/2/39	6682	4532
W4(78)	Deal sheet, first run, Athens, N. Y., 9/28/37	6683	4533
W4(79)	Deal sheet, first run, Lexington, Ky., 9/28/37	6684	4534
W4(80)	Deal sheet, second run, Lexington, Ky., 9/28/37	6685	4535
W4(81)	Deal sheet, third run, Lexington, Ky., 9/28/37	6686	4536
W4(82)	Deal sheet, first run, Richmond, Ky., 9/28/37	6687	4537
W4(83)	Deal sheet, first run, Bellefontaine, O., 9/28/37	6688	4538

EXHIBITS PRINTED IN FULL—Continued

		Original	Print
W4(84)	Deal sheet, first run, Mount Vernon, O., 9/28/37	6689	4539
W4(85)	Deal sheet, first run, St. Michaels, Md., 11/2/39.	6690	4540
W4(86)	Deal sheet, first run, Hurlock, Md., 10/12/38.	6691	4541
W4(87)	Deal sheet, first run, Laurel, Del., 4/2/40	6692	4542
W4(88)	Deal sheet, first run, Paris, Ky., 9/28/37	6693	4543
W4(89)	Deal sheet, second run, Paris, Ky., 12/1/38	6694	4544
W4(90)	Deal sheet, first run, Maysville, Ky., 10/12/38.	6695	4545
W4(91)	Deal sheet, first run, Middlesboro, Ky., 12/1/38.	6696	4546
W4(92)	Deal sheet, first run, Piqua, Ohio, 9/28/37	6697	4547
W4(93)	Deal sheet, first run, Corbin, Ky., 12/1/38	6698	4548
W4(94)	Deal sheet, fourth run, Lexington, Ky., 1/12/39.	6699	4549
W4(95)	Deal sheet, first run, Cambridge, Md., 10/12/37.	6700	4550
W4(96)	Deal sheet, first run, Easton, Md., 10/12/38	6702	4552
W4(97)	Deal sheet, first run, Federalsburg, Md., 10/12/38	6704	4554
W4(98)	Deal sheet, first run, Milford, Del., 4/2/40	6706	4556
W4(99)	Deal sheet, first run, Salisbury, Md., 10/12/38.	6707	4557
W5	Letter agreement, Vitagraph Inc. and Schine, 3/24/36	6709	4559
W7	Letter agreement, Vitagraph Inc. and Schine, 4/24/35 and supplement letter of 4/29/35	6711	4561
W34(1)	Deal sheet, first run, Cortland, N. Y., 9/11/40.	6714	4565
W34(2)	Deal sheet, first run East Rochester, N. Y. or Fairport, N. Y., 12/6/40	6715	4566
W34(3)	Deal sheet, first run, Geneva, N. Y., 9/11/40	6716	4567
W34(4)	Deal sheet, first run, Glens Falls, N. Y., 9/11/40.	6717	4568
W34(5)	Deal sheet, second run, Glens Falls, N. Y., 9/11/40	6718	4569
W34(6)	Deal sheet, second run, Gloversville, N. Y., 12/6/40	6719	4570
W34(7)	Deal sheet, first run, Gloversville, N. Y.	6720	4571
W34(8)	Deal sheet, first run, Granville, N. Y., 9/11/40.	6721	4572
W34(9)	Deal sheet, first run, Hamilton, N. Y., 9/11/40.	6722	4573
W34(10)	Deal sheet, first run, Herkimer, N. Y., 9/11/40.	6723	4574
W34(11)	Deal sheet, first run, Hudson Falls, N. Y., 9/11/40	6724	4575
W34(12)	Deal sheet, first run, Ilion, N. Y., 9/11/40.	6725	4576
W34(13)	Deal sheet, first run, Little Falls, N. Y., 12/6/40.	6726	4577
W34(14)	Deal sheet, first run, Malone, N. Y., 9/11/40.	6727	4578
W34(15)	Deal sheet, first run, Massena, N. Y., 9/11/40.	6728	4579
W34(16)	Deal sheet, first run, Mechanicville, N. Y., 9/11/40	6729	4580
W34(17)	Deal sheet, first run, Norwich, N. Y., 9/11/40.	6730	4581
W34(18)	Deal sheet, first run, Ogdensburg, N. Y., 9/11/40	6731	4582
W34(19)	Deal sheet, second run, Ogdensburg, N. Y., 9/11/40	6732	4583
W34(20)	Deal sheet, first run, Oneonta, N. Y., 9/11/40.	6733	4584
W34(21)	Deal sheet, second run, Oneonta, N. Y., 9/11/40.	6734	4585

EXHIBITS PRINTED IN FULL—Continued

		Original	Print
W34(22)	Deal sheet, first run, Oswego, N. Y., 9/11/40	6735	4586
W34(23)	Deal sheet, second run, Oswego, N. Y., 9/11/40	6736	4587
W34(24)	Deal sheet, first run, Perry, N. Y., 9/11/40	6737	4588
W34(25)	Deal sheet, first run, Salamanca, N. Y., 9/11/40	6738	4589
W34(26)	Deal sheet, first run, Saranac Lake, N. Y., 9/11/40	6739	4590
W34(27)	Deal sheet, first run, Seneca Falls, N. Y., 9/11/40	6740	4591
W34(28)	Deal sheet, first run, Tupper Lake, N. Y., 9/11/40	6741	4592
W34(29)	Deal sheet, second run, Watertown, N. Y., 9/11/40	6742	4593
W34(30)	Deal sheet, first run, Watertown, N. Y., 9/11/40	6743	4594
W34(31)	Deal sheet, first run, Whitehall, N. Y., 9/11/40	6744	4595
W34(32)	Deal sheet, first run, Ashland, O., 9/11/40	6745	4596
W34(33)	Deal sheet, first run, Athens, Ohio, 9/11/40	6746	4597
W34(34)	Deal sheet, first run, Bowling Green, O., 9/11/40	6747	4598
W34(35)	Deal sheet, second run, Bowling Green, O., 9/11/40	6748	4599
W34(36)	Deal sheet, first run, Bucyrus, O., 9/11/40	6749	4600
W34(37)	Deal sheet, first run, Delaware, O., 9/11/40	6750	4601
W34(38)	Deal sheet, first run, Fostoria, O., 9/11/40	6751	4602
W34(39)	Deal sheet, first run, Kent or Ravenna, O., 9/11/40	6752	4603
W34(40)	Deal sheet, second run, Kent or Ravenna, O., 9/11/40	6753	4604
W34(41)	Deal sheet, first run, Medina, O., 9/11/40	6754	4605
W34(42)	Deal sheet, first run, Norwalk, Ohio, 9/11/40	6755	4606
W34(43)	Deal sheet, first run, Piqua, Ohio, 9/11/40	6756	4607
W34(44)	Deal sheet, first run, Shelby, Ohio, 9/11/40	6757	4608
W34(45)	Deal sheet, first run, Tiffin, Ohio, 9/11/40	6758	4609
W34(46)	Deal sheet, first run, Van Wert, O., 9/11/40	6759	4610
W34(47)	Deal sheet, first run, Wooster, Ohio, 9/11/40	6760	4611
W34(48)	Deal sheet, second run, Wooster, O., 9/11/40	6761	4612
W34(49)	Deal sheet, first run, Corbin, Ky., 9/11/40	6762	4613
W34(50)	Deal sheet, first run, Lexington, Ky., 9/11/40	6763	4614
W34(51)	Deal sheet, second run, Lexington, Ky., 9/11/40	6764	4615
W34(52)	Deal sheet, third run, Lexington, Ky., 9/11/40	6765	4616
W34(53)	Deal sheet, fourth run, Lexington, Ky., 9/11/40	6766	4617
W34(54)	Deal sheet, first run, Maysville, Ky., 9/11/40	6767	4618
W34(55)	Deal sheet, first run, Middlesboro, Ky., 9/11/40	6768	4619
W34(56)	Deal sheet, first run, Paris, Ky., 9/11/40	6769	4620
W34(57)	Deal sheet, first run, Richmond, Ky., 9/11/40	6770	4621
W34(58)	Deal sheet, first run, Cambridge, Md., 9/11/40	6771	4622
W34(59)	Deal sheet, first run, Easton, Md., 9/11/40	6772	4623
W34(60)	Deal sheet, first run, Federalsburg, Md., 9/11/40	6773	4624
W34(61)	Deal sheet, first run, Salisbury, Md., 9/11/40	6774	4625
W34(62)	Deal sheet, first run, Salisbury, Md., 9/11/40	6775	4626

EXHIBITS PRINTED IN FULL—Continued

		Original	Print
W34(63)	Deal sheet, first run, Amsterdam, N. Y., 9/11/40	6776	4627
W34(64)	Deal sheet, second run, Amsterdam, N. Y., 9/11/40	6777	4628
W34(65)	Deal sheet, second run, Auburn, N .Y., 9/11/40.	6778	4629
W34(66)	Deal sheet, first run, Auburn, N. Y., 9/11/40.	6779	4630
W34(67)	Deal sheet, first run, Ballston, N. Y., 9/11/40.	6780	4631
W34(68)	Deal sheet, first run, Bath, N. Y., 9/11/40	6781	4632
W34(69)	Deal sheet, first run, Canandaigua, N. Y., 9/11/40	6782	4633
W34(70)	Deal sheet, first run, Carthage, N. Y., 9/11/40.	6783	4634
W34(71)	Deal sheet, second run, Corning, N. Y., 9/11/40.	6784	4635
W34(72)	Deal sheet, first run, Corning, N. Y., 9/11/40.	6785	4636
W34(73)	Deal sheet, first run, Bellefontaine, N. Y., 9/11/40	6786	4637
W34(74)	Deal sheet, first run, Mount Vernon, O., 9/11/40	6787	4638
W34(75)	Deal sheet, first run, Hurlock, Md., 9/11/40.	6788	4639
W34(76)	Deal sheet, first run, St. Michels, Md., 9/11/40.	6789	4640
W34(77)	Deal sheet, first run, Laurel, Del., 9/11/40	6790	4641
W34(78)	Deal sheet, first run, Milford, Del., 9/11/40.	6791	4642
W34(79)	Deal sheet, second run, Lockport, N. Y., 9/11/40	6792	4643
W34(80)	Deal sheet, second run, Geneva, N. Y., 9/11/40.	6793	4644
W35A	Agreement, Vitagraph Inc. and Schine, 9/11/40.	6794	4645
W35B	Agreement, Vitagraph Inc. and Schine, 9/11/40	6795	4646
U137	Agreement, Universal and Schine, 9/7/38	6796	4649
U137(1)	Deal sheet, first run, Amsterdam, N. Y., 8/26/38	6797	4650
U137(2)	Deal sheet, first run, Ballston, N. Y., 9/26/38.	6798	4651
U137(3)	Deal sheet, first run, Carthage, N. Y., 9/26/38.	6799	4652
U137(4)	Deal sheet, first run, Glens Falls, N. Y., 9/26/38.	6800	4653
U137(5)	Deal sheet, second run, Glens Falls, N. Y., 9/26/38	6801	4654
U137(6)	Deal sheet, first run, Gloversville, N. Y., 9/26/38	6802	4655
U137(7)	Deal sheet, second run, Gloversville, N. Y., 9/26/38	6803	4656
U137(8)	Deal sheet, first run, Granville, N. Y., 9/26/38.	6804	4657
U137(9)	Deal sheet, first run, Hamilton, N. Y., 9/26/38.	6805	4658
U137(10)	Deal sheet, first run, Herkimer, N. Y., 9/26/38.	6806	4659
U137(11)	Deal sheet, first run, Hudson Falls, N. Y., 9/26/38	6807	4660
U137(12)	Deal sheet, first run, Ilion, N. Y., 9/26/38	6808	4661
U137(13)	Deal sheet, first run, Little Falls, N. Y., 9/26/38.	6809	4662
U137(14)	Deal sheet, first run, Malone, N. Y., 9/26/38	6810	4663
U137(15)	Deal sheet, first run, Massena, N. Y., 8/26/38.	6811	4664
U137(16)	Deal sheet, first run, Mechanicville, N. Y., 8/26/38	6812	4665
U137(17)	Deal sheet, first run, Norwich, N. Y., 8/26/38.	6813	4666

EXHIBITS PRINTED IN FULL—Continued

		Original	Print
U137(18)	Deal sheet, first run, Ogdensburg, N. Y., 8/26/38	6814	4667
U137(19)	Deal sheet, first run, Oneonta, N. Y., 8/26/38	6815	4668
U137(20)	Deal sheet, first run, Saranac Lake, N. Y., 8/26/38	6816	4669
U137(21)	Deal sheet, first run, Tupper Lake, N. Y., 8/26/38	6817	4670
U137(22)	Deal sheet, first run, Watertown, N. Y., 8/26/38	6818	4671
U137(23)	Deal sheet, second run, Watertown, N. Y., 8/26/38	6819	4672
U137(24)	Deal sheet, first run, Whitehall, N. Y., 8/26/38	6820	4673
U137(25)	Deal sheet, first run, Auburn, N. Y., 8/26/38	6821	4674
U137(26)	Deal sheet, second run, Auburn, N. Y., 8/26/38	6822	4675
U137(27)	Deal sheet, Buffalo, N. Y., 8/26/38	6823	4676
U137(28)	Deal sheet, Buffalo, N. Y., 8/26/38	6824	4677
U137(29)	Deal sheet, first run, Bath, N. Y., 8/26/38	6825	4678
U137(30)	Deal sheet, first run, Canandaigua, N. Y., 8/26/38	6826	4679
U137(31)	Deal sheet, first run, Corning, N. Y., 8/26/38	6827	4680
U137(32)	Deal sheet, second run, Corning, N. Y., 8/26/38	6828	4681
U137(33)	Deal sheet, first run, Cortland, N. Y., 8/26/38	6829	4682
U137(34)	Deal sheet, first run, Geneva, N. Y., 8/26/38	6880	4683
U137(35)	Deal sheet, first run, Lockport, N. Y., 8/26/38	6831	4684
U137(36)	Deal sheet, second run, Lockport, N. Y., 8/26/38	6832	4685
U137(37)	Deal sheet, first run, Newark, N. Y., 8/26/38	6833	4686
U137(38)	Deal sheet, first run, Oswego, N. Y., 8/26/38	6834	4687
U137(39)	Deal sheet, first run, Penn Yan, N. Y., 8/26/38	6835	4688
U137(40)	Deal sheet, first run, Perry, N. Y., 8/26/38	6836	4689
U137(41)	Deal sheet, Rochester, N. Y., 8/26/38	6837	4690
U137(42)	Deal sheet, Rochester, N. Y., 8/26/38	6838	4691
U137(43)	Deal sheet, Rochester, N. Y., 8/26/38	6839	4692
U137(44)	Deal sheet, Rochester, N. Y., 8/26/38	6840	4693
U137(45)	Deal sheet, repeat run, Rochester, N. Y., 8/26/38	6841	4694
U137(46)	Deal sheet, Rochester, N. Y., 8/26/38	6842	4695
U137(47)	Deal sheet, repeat run, Rochester, N. Y., 8/26/38	6843	4696
U137(48)	Deal sheet, first run, Salamanca, N. Y., 8/26/38	6844	4697
U137(49)	Deal sheet, first run, Seneca Falls, N. Y., 8/26/38	6845	4698
U137(51)	Deal sheet, first run, Bellefontaine, O., 8/26/38	6846	4699
U137(52)	Deal sheet, first run, Corbin, Ky., 11/10/38	6847	4700
U137(53)	Deal sheet, second run, Corbin, Ky., 1/16/39	6848	4701
U137(54)	Deal sheet, first run, Delaware, Ohio, 8/26/38	6849	4702
U137(55)	Deal sheet, first run, Maysville, Ky., 1/16/38	6850	4703
U137(56)	Deal sheet, first run, Middlesboro, Ky., 11/10/38	6851	4704
U137(57)	Deal sheet, first run, Piqua, Ohio, 8/26/38	6852	4705
U137(58)	Deal sheet, first run, Lexington, Ky., 8/26/38	6853	4706
U137(59)	Deal sheet, second run, Lexington, Ky., 8/26/38	6854	4707

EXHIBITS PRINTED IN FULL—Continued

		Original	Print
U137(60)	Deal sheet, first run, Paris, Ky., 8/26/38	6855	4708
U137(61)	Deal sheet, first run, Ashland, Ohio, 8/26/38	6856	4709
U137(62)	Deal sheet, first run, Bucyrus, O., 8/26/38	6857	4710
U137(63)	Deal sheet, first run, Fostoria, O., 8/26/38	6858	4711
U137(64)	Deal sheet, first run, Mt. Vernon, O., 8/26/38	6859	4712
U137(65)	Deal sheet, first run, Norwalk, O., 8/26/38	6860	4713
U137(66)	Deal sheet, first run, Tiffin, O., 8/26/38	6861	4714
U137(67)	Deal sheet, first run, Van Wert, O., 8/26/38	6862	4715
U137(68)	Deal sheet, first run, Wooster, O., 8/26/38	6863	4716
U137(69)	Deal sheet, first run, Cambridge, Md., 8/26/38	6864	4717
U137(70)	Deal sheet, first run, Easton, Md., 11/10/38	6865	4718
U137(71)	Deal sheet, first run, Federalsburg, Md., 11/10/38	6866	4719
U137(72)	Deal sheet, first run, Hurlock, Md., 11/10/38	6867	4720
U137(73)	Deal sheet, first run, Laurel, Del., 4/17/39	6868	4721
U137(74)	Deal sheet, Milford, Del., 4/17/39	6869	4722
U137(75)	Deal sheet, first run, Salisbury, Md., 10/21/38	6870	4723
U207	Agreement Universal and Schine, 6/27/39	6871	4724
U207(1)	Deal sheet, Universal and Schine, 6/27/39	6872	4725
U207(2)	Deal sheet, Universal and Schine, 6/27/39	6873	4726
U207(3)	Deal sheet, Universal and Schine, 6/27/39	6874	4727
U207(4)	Deal sheet, Universal and Schine, 6/27/39	6875	4728
U207(5)	Deal sheet, Universal and Schine, 6/27/39, Glens Falls, second run	6876	4729
U207(6)	Deal sheet, Universal and Schine, 6/27/39, Gloversville, first run	6877	4730
U207(7)	Deal sheet, Universal and Schine, 6/27/39, Gloversville, second run	6878	4731
U207(8)	Deal sheet, Universal and Schine, 6/27/39, Granville, first run	6879	4732
U207(9)	Deal sheet, Universal and Schine, 6/27/39, Hamilton, first run	6880	4733
U207(10)	Deal sheet, Universal and Schine, 6/27/39, Herkimer, first run	6881	4734
U207(11)	Deal sheet, Universal and Schine, 6/27/39, Hudson Falls, first run	6882	4735
U207(12)	Deal sheet, Universal and Schine, 6/27/39, Ilion, first run	6883	4736
U207(13)	Deal sheet, Universal and Schine, 6/27/39, Little Falls, first run	6884	4737
U207(14)	Deal sheet, Universal and Schine, 6/27/39, Malone, first run	6885	4738
U207(15)	Deal sheet, Universal and Schine, 6/27/39, Massena, first run	6886	4739
U207(16)	Deal sheet, Universal and Schine, 6/27/39, Mechanicville, first run	6887	4740
U207(17)	Deal sheet, Universal and Schine, 6/27/39, Norwich, first run	6888	4741
U207(18)	Deal sheet, Universal and Schine, 6/27/39, Ogdensburg, first run	6889	4742

EXHIBITS PRINTED IN FULL—Continued

		Original	Print
U207(19)	Deal sheet, Universal and Schine, 6/27/39, Oneonta, first run	6890	4743
U207(20)	Deal sheet, Universal and Schine, 6/27/39, Saranac Lake, first run	6891	4744
U207(21)	Deal sheet, Universal and Schine, 6/27/39, Tupper Lake, first run	6892	4745
U207(22)	Deal sheet, Universal and Schine, 6/27/39, Watertown, first run	6893	4746
U207(23)	Deal sheet, Universal and Schine, 6/27/39, Watertown, second run	6894	4747
U207(24)	Deal sheet, Universal and Schine, 6/27/39, Whitehall, first run	6895	4748
U207(25)	Deal sheet, Universal and Schine, 6/27/39, Auburn, first run	6896	4749
U207(26)	Deal sheet, Universal and Schine, 6/27/39, Auburn, second run	6897	4750
U207(27)	Deal sheet, Universal and Schine, 6/27/39, Bath, first run	6898	4751
U207(28)	Deal sheet, Universal and Schine, 6/27/39, Buffalo (Granada), second run	6899	4752
U207(29)	Deal sheet, Universal and Schine, 6/27/39, Buffalo (Riverside) 2nd run	6900	4753
U207(30)	Deal sheet, Universal and Schine, 6/27/39, Canandaigua, first run	6901	4754
U207(31)	Deal sheet, Universal and Schine, 6/27/39, Corning, first run	6902	4755
U207(32)	Deal sheet, Universal and Schine, 6/27/39, Corning, second run	6903	4756
U207(33)	Deal sheet, Universal and Schine, 6/27/39, Cortland, first run	6904	4757
U207(34)	Deal sheet, Universal and Schine, 6/27/39, E. Rochester or Fairport, first and repeat	6905	4758
U207(35)	Deal sheet, Universal and Schine, 6/27/39, Geneva, first run	6906	4759
U207(36)	Deal sheet, Universal and Schine, 6/27/39, Lockport, first run	6907	4760
U207(37)	Deal sheet, Universal and Schine, 6/27/39, Lockport, second run	6908	4761
U207(38)	Deal sheet, Universal and Schine, 6/27/39, Newark, first run	6909	4762
U207(39)	Deal sheet, Universal and Schine, 6/27/39, Oswego, first run	6910	4763
U207(40)	Deal sheet, Universal and Schine, 6/27/39, Penn Yan, first run	6911	4764
U207(41)	Deal sheet, Universal and Schine, 6/27/39, Perry, first run	6912	4765
U207(42)	Deal sheet, Universal and Schine, 6/27/39, Rochester, Cameo	6913	4766
U207(43)	Deal sheet, Universal and Schine, 6/27/39, Rochester—Dixie or State	6914	4767

EXHIBITS PRINTED IN FULL—Continued

		Original	Print
U207(44)	Deal sheet, Universal and Schine, 6/27/39, Rochester—Dixie or State repeat	6915	4768
U207(45)	Deal sheet, Universal and Schine, 6/27/39, Rochester, Grand	6916	4769
U207(46)	Deal sheet, Universal and Schine, 6/27/39, Rochester, Lake	6917	4770
U207(47)	Deal sheet, Universal and Schine, 6/27/39, Rochester—Rivera or Liberty	6918	4771
U207(48)	Deal sheet, Universal and Schine, 6/27/39, Rochester—Liberty repeat	6919	4772
U207(49)	Deal sheet, Universal and Schine, 12/15/39, Rochester, Madison	6920	4773
U207(50)	Deal sheet, Universal and Schine, 12/15/39, Rochester, Monroe	6921	4774
U207(51)	Deal sheet, Universal and Schine, 12/5/40, Rochester—Webster	6922	4775
U207(52)	Deal sheet, Universal and Schine, 12/18/41, Rochester—Webster	6923	4776
U207(53)	Deal sheet, Universal and Schine, 12/18/39, Rochester—West End	6924	4777
U207(54)	Deal sheet, Universal and Schine, 6/27/39, Salamanca, first run	6925	4778
U207(55)	Deal sheet, Universal and Schine, 6/27/39, Seneca Falls, first run	6926	4779
U207(56)	Deal sheet, Universal and Schine, 6/27/39, Syracuse—Palace	6927	4780
U207(57)	Deal sheet, Universal and Schine, 6/27/39 Athens, Ohio—first run	6928	4781
U207(58)	Deal sheet, Universal and Schine, 6/27/39, Corbin, Ky., first run	6929	4782
U207(59)	Deal sheet, Universal and Schine, 6/27/39, Lexington, Ky.—first run	6930	4783
U207(60)	Deal sheet, Universal and Schine, 6/27/39, Lexington, Ky.—second run	6931	4784
U207(61)	Deal sheet, Universal and Schine, 3/4/40, Lexington, Ky. (Opera House) third run	6932	4785
U207(62)	Deal sheet, Universal and Schine, 1/22/41, Lexington, Ky.—(Ada Meade) fourth run	6933	4786
U207(63)	Deal sheet, Universal and Schine, 6/27/39, Maysville, Ky.—first run	6934	4787
U207(64)	Deal sheet, Universal and Schine, 6/27/39, Middlesboro, Ky.—first run	6935	4788
U207(65)	Deal sheet, Universal and Schine, 6/27/39, Paris, Ky.—first run	6936	4789
U207(66)	Deal sheet, Universal and Schine, 6/27/39, Piqua, Ohio—first run	6937	4790
U207(67)	Deal sheet, Universal and Schine, 6/27/39, Richmond, Ky.—first run	6938	4791
U207(68)	Deal sheet, Universal and Schine, 6/27/39, Ashland, Ohio—first run	6939	4792

EXHIBITS PRINTED IN FULL—Continued

		Original	Print
U207(69)	Deal sheet, Universal and Schine, 6/27/39, Bellefontaine, Ohio—first run	6940	4793
U207(70)	Deal sheet, Universal and Schine, 6/27/39, Bowling Green, Ohio—first run	6941	4794
U207(71)	Deal sheet, Universal and Schine, 6/27/39, Bucyrus, Ohio—first run	6942	4795
U207(72)	Deal sheet, Universal and Schine, 6/27/39, Delaware, Ohio—first run	6943	4796
U207(73)	Deal sheet, Universal and Schine, 6/27/39, Fostoria, Ohio—first run	6944	4797
U207(74)	Deal sheet, Universal and Schine, 6/27/39, Kent or Ravenna, first run	6945	4798
U207(75)	Deal sheet, Universal and Schine, 6/27/39, Kent or Ravenna, repeat	6946	4799
U207(76)	Deal sheet, Universal and Schine, 6/27/39, Medina, first run	6947	4800
U207(77)	Deal sheet, Universal and Schine, 6/27/39, Mt. Vernon, first run	6948	4801
U207(78)	Deal sheet, Universal and Schine, 6/27/39, Norwalk, first run	6949	4802
U207(79)	Deal sheet, Universal and Schine, 6/27/39, Tiffin, first run	6950	4803
U207(80)	Deal sheet, Universal and Schine 6/27/39, Van Wert, first run	6951	4804
U207(81)	Deal sheet, Universal and Schine, 6/27/39, Wooster, first run	6952	4805
U207(82)	Deal sheet, Universal and Schine, 6/27/39, Cambridge, Md. first run	6953	4806
U207(83)	Deal sheet, Universal and Schine, 6/27/39, Easton, first run	6954	4807
U207(84)	Deal sheet, Universal and Schine, 6/27/39, Federalsburg, first run	6955	4808
U207(85)	Deal sheet, Universal and Schine, 12/15/39, Hurlock, first run	6956	4809
U207(86)	Deal sheet, Universal and Schine, 6/27/39, Laurel, Del., first run	6957	4810
U207(87)	Deal sheet, Universal and Schine, 6/27/39, Milford, first run	6958	4811
U207(88)	Deal sheet, Universal and Schine, 6/27/39, Salisbury, Md., first run	6955	4812
U207(89)	Deal sheet, Universal and Schine, 12/15/39, St. Michaels, first run	6960	4813
R1	Agreement, RKO and Schine, 11/20/36	6961	4814
R2(1)	Deal sheet, first run, Auburn, N. Y.	6962	4815
R2(2)	Deal sheet, first run, 11/20/36, Bath, N. Y.	6963	4816
R2(3)	Deal sheet, first run, 11/20/36, Canandaigua, N. Y.	6964	4817
R2(4)	Deal sheet, first run, 11/20/36, Carthage, N. Y.	6965	4818
R2(5)	Deal sheet, first and second runs, 11/20/36, Corning, N. Y.	6966	4819

EXHIBITS PRINTED IN FULL—Continued

		Original	Print
R2(6)	Deal sheet, first run, Cortland, N. Y., 11/20/36.	6967	4820
R2(7)	Deal sheet, first run, Geneva, N. Y., 11/20/36.	6968	4821
R2(8)	Deal sheet, first and second runs Glens Falls, N. Y., 11/20/36	6969	4822
R2(9)	Deal sheet, first run, Gloversville N. Y., 11/20/36	6970	4823
R2(10)	Deal sheet, first run, Hamilton, N. Y., 11/20/36.	6971	4824
R2(11)	Deal sheet, first run, Herkimer, N. Y., 11/20/36.	6972	4825
R2(12)	Deal sheet, first run, Hudson Falls, N. Y., 11/20/36	6973	4826
R2(13)	Deal sheet, first run, Little Falls, N.Y., 11/20/36	6974	4827
R2(14)	Deal sheet, first and second runs, Lockport, N. Y., 11/20/36	6975	4828
R2(15)	Deal sheet, first run, Malone, N. Y., 11/20/36.	6976	4829
R2(16)	Deal sheet, first run, Massena, N. Y., 11/20/36.	6977	4830
R2(17)	Deal sheet, first run, Newark, N. Y., 11/20/36.	6978	4831
R2(18)	Deal sheet, first run, Norwich, N. Y., 11/20/36.	6979	4832
R2(19)	Deal sheet, first run, Oneonta, N. Y., 11/20/36.	6980	4833
R2(20)	Deal sheet, first run, Ogdensburg, N. Y., 11/20/36	6981	4834
R2(21)	Deal sheet, first run, Oswego, N. Y., 11/20/36.	6982	4835
R2(22)	Deal sheet, first run, Penn Yan, N. Y., 11/20/36.	6983	4836
R2(23)	Deal sheet, first run, Perry, N. Y., 11/20/36...	6984	4837
R2(24)	Deal sheet, first run, Rochester, N. Y., 11/20/36.	6985	4838
R2(25)	Deal sheet, first run, Rochester, N. Y., 11/20/36.	6986	4839
R2(26)	Deal sheet, first run, Rochester, N. Y., 11/20/36.	6987	4840
R2(27)	Deal sheet, first run, Rochester, N. Y., 11/20/36.	6988	4841
R2(28)	Deal sheet, first run, Rochester, N. Y., 11/20/36.	6989	4842
R2(29)	Deal sheet, first run, Rochester, N. Y., 11/20/36.	6990	4843
R2(30)	Deal sheet, first run, Salamanca, N. Y., 11/20/36	6991	4844
R2(31)	Deal sheet, first run, Saranac Lake, N. Y., 11/20/36	6992	4845
R2(32)	Deal sheet, first run, Seneca Falls, N. Y., 11/20/36	6993	4846
R2(33)	Deal sheet, first run, Tupper Lake, N. Y., 11/20/36	6994	4847
R2(34)	Deal sheet, first and second runs, Watertown, N. Y., 11/20/36	6995	4848
R2(35)	Deal sheet, first run, 11/19/36, Ashland, Ohio.	6996	4849
R2(36)	Deal sheet, first run, Athens, O., 11/30/36.....	6997	4850
R2(37)	Deal sheet, first run, Bellefontaine, O., 11/20/36.	6998	4851
R2(38)	Deal sheet, first run, Bucyrus, O., 11/19/36....	6999	4852
R2(39)	Deal sheet, first run, Fostoria, O., 11/20/36....	7000	4853
R2(40)	Deal sheet, first run, Norwalk, O., 11/19/36...	7001	4854
R2(41)	Deal sheet, first run, Piqua, O., 11/30/36.....	7002	4855
R2(42)	Deal sheet, first run, Van Wert, O., 11/19/36..	7003	4856
R2(43)	Deal sheet, first run, Wooster, O., 11/19/36....	7004	4854
R2(44)	Deal sheet, first run, Paris, Ky., 11/30/36.....	7005	4858
R2(45)	Deal sheet, first run, Richmond, Ky., 11/30/36.	7006	4859
R2(46)	Deal sheet, first run, Tiffin, O., 11/20/36.....	7007	4860

EXHIBITS PRINTED IN FULL—Continued

		Original	Print
R2(47)	Deal sheet, subsequent run, Buffalo, N. Y., 11/20/36	7008	4868
R2(48)	Deal sheet, subsequent run, Buffalo, N. Y., 11/20/36	7009	4862
R2(50)	Deal sheet, first run, Mt. Vernon, O., 11/20/36.	7010	4863
R2(51)	Deal sheet, first run, Lexington, Ky., 11/30/36.	7011	4864
R20	Letter agreement, 10/18/35	7012	4865
R37			
R37(1)	Deal sheet, first run, RKO and Schine, Amsterdam, N. Y., 11/2/36	7013	4866
R37(2)	Deal sheet, second run, Amsterdam, N. Y., 8/15/38	7014	4867
R37(3)	Deal sheet, first run, Ballston, N. Y., 8/15/38	7015	4868
R37(4)	Deal sheet, first run, Glens Falls, N. Y., 8/15/38.	7016	4869
R37(5)	Deal sheet, second run, Glens Falls, N. Y., 8/15/38	7017	4870
R37(6)	Deal sheet, first run, Gloversville, N. Y., 8/15/38	7018	4871
R37(8)	Deal sheet, first run, Hamilton, N. Y., 8/15/38.	7019	4872
R37(9)	Deal sheet, first run, Herkimer, N. Y., 8/15/38.	7020	4873
R37(10)	Deal sheet, first run, Hudson Falls, N. Y., 8/15/38	7021	4874
R37(11)	Deal sheet, first run, Ilion, N. Y., 8/15/38	7022	4875
R37(12)	Deal sheet, first run, Malone, N. Y., 8/15/38.	7023	4876
R37(13)	Deal sheet, first run, Massena, N. Y., 8/15/38.	7024	4877
R37(14)	Deal sheet, first run, Mechanicville, N. Y., 8/15/38	7025	4878
R37(15)	Deal sheet, first run, Norwich, N. Y., 8/15/38	7026	4879
R37(16)	Deal sheet, first run, Ogdensburg, N. Y., 8/15/38	7027	4880
R37(17)	Deal sheet, first run, Oeonta, N. Y., 8/15/38	7028	4881
R37(18)	Deal sheet, first run, Saranac Lake, N. Y., 8/15/38	7029	4882
R37(19)	Deal sheet, first run, Tupper Lake, N. Y., 8/15/38	7030	4883
R37(20)	Deal sheet, first run, Watertown, N. Y., 8/15/38.	7031	4884
R37(21)	Deal sheet, second run, Watertown, N. Y., 8/15/38	7032	4885
R37(22)	Deal sheet, first run, Whitehall, N. Y., 8/15/38.	7033	4886
R37(23)	Deal sheet, first run, Auburn, N. Y., 8/15/38	7034	4887
R37(24)	Deal sheet, second run, Auburn, N. Y., 1/11/30.	7035	4888
R37(25)	Deal sheet, first run, Bath, N. Y., 8/15/38	7036	4889
R37(26)	Deal sheet, first run, Canandaigua, N. Y., 8/15/38	7037	4890
R37(27)	Deal sheet, first run, Corning, N. Y., 8/15/38	7038	4891
R37(28)	Deal sheet, second run, Corning, N. Y., 8/15/38.	7039	4892
R37(29)	Deal sheet, first run, Cortland, N. Y., 8/15/38.	7040	4893
R37(30)	Deal sheet, first run, Geneva, N. Y., 8/15/38	7041	4894
R37(31)	Deal sheet, first run, Lockport, N. Y., 8/15/38	7042	4895

EXHIBITS PRINTED IN FULL—Continued

		Original	Print
R37(32)	Deal sheet, second run, Lockport, N. Y., 8/15/38	7043	4896
R37(33)	Deal sheet, first run, Newark, N. Y., 8/15/38	7044	4897
R37(34)	Deal sheet, first run, Penn Yan, N. Y., 8/15/38	7045	4898
R37(35)	Deal sheet, first run, Perry, N. Y., 8/15/38	7046	4899
R37(36)	Deal sheet, subsequent run, Rochester, N. Y., 8/16/38	7047	4900
R37(37)	Deal sheet, RKO and Schine, subsequent run Rochester, N. Y., 8/15/38	7048	4901
R37(38)	Deal sheet, subsequent run, Rochester, N. Y., 8/15/38	7049	4902
R37(39)	Deal sheet, subsequent run, Rochester, N. Y., 8/20/38	7050	4903
R37(40)	Deal sheet, subsequent run, Rochester, N. Y., 8/20/38	7051	4904
R37(41)	Deal sheet, repeat run, Rochester, N. Y., 8/15/38	7052	4905
R37(42)	Deal sheet, first run, Salamanca, N. Y., 8/15/38	7053	4906
R37(43)	Deal sheet, first run, Seneca Falls, N. Y., 8/15/38	7054	4907
R37(44)	Deal sheet, first run, Ashland, O., 8/15/38	7055	4908
R37(45)	Deal sheet, first run, Athens, O., 8/15/38	7056	4909
R37(46)	Deal sheet, first run, Bellefontaine, O., 8/15/38	7057	4910
R37(47)	Deal sheet, first run, Bucyrus, O., 8/15/38	7058	4911
R37(48)	Deal sheet, first run, Delaware, O., 8/15/38	7059	4912
R37(49)	Deal sheet, first run, Fostoria, O., 8/15/38	7060	4913
R37(50)	Deal sheet, first run, Kent or Ravenna, Ohio, 8/15/38	7061	4914
R37(51)	Deal sheet, repeat run, Kent or Ravenna, Ohio, 8/15/38	7062	4915
R37(52)	Deal sheet, first run, Medina, Ohio, 8/15/38	7063	4916
R37(53)	Deal sheet, first run, Mt. Vernon, Ohio, 8/15/38	7064	4917
R37(54)	Deal sheet, first run, Norwalk, O., 8/15/38	7065	4918
R37(55)	Deal sheet, first run, Shelby, Ohio, 8/15/38	7066	4919
R37(56)	Deal sheet, first run, Tiffin, Ohio, 8/15/38	7067	4920
R37(57)	Deal sheet, first run, Van Wert, Ohio, 8/15/38	7068	4921
R37(58)	Deal sheet, first run, Wooster, Ohio, 8/15/38	7069	4922
R37(59)	Deal sheet, first run, Lexington, Ky., 8/15/38	7070	4923
R37(60)	Deal sheet, second run, Lexington, Ky., 8/15/38	7071	4924
R37(61)	Deal sheet, third run, Lexington, Ky., 8/15/38	7072	4925
R37(62)	Deal sheet, first run, Paris, Ky., 8/15/38	7073	4926
R37(63)	Deal sheet, first run, Piqua, Ohio, 8/15/38	7074	4927
R37(64)	Deal sheet, first run, Richmond, Ky., 8/15/38	7075	4928
R37(65)	Deal sheet, first run, Little Falls, N. Y., 8/15/38	7076	4929
R37(66)	Deal sheet, RKO and Schine, first run, East Rochester or Fairport, N. Y., 11/28/39	7077	4930
R37(67)	Deal sheet, fourth run, Lexington, Ky., 4/21/41	7078	4931
R37(68)	Deal sheet, first run, Oswego, N. Y., 10/26/38	7079	4932
R37(69)	Deal sheet, first run, Pikesville, Ky., 3/9/39	7080	4933
R37(70)	Deal sheet, first run, Salisbury, Md., 11/3/38	7081	4934

EXHIBITS PRINTED IN FULL—Continued

		Original	Print
R37(71)	Deal sheet, first run, Hurlock, Md., 10/9/40	7082	4935
R37(72)	Deal sheet, first run, 8/15/38, Cambridge, Md.	7083	4936
R37(73)	Deal sheet, first run, Maysville, Ky., 8/15/38	7084	4937
R37(74)	Deal sheet, first run, Easton, Md., 11/3/38	7085	4938
R37(75)	Deal sheet, first run, Federalsburg, Md., 11/3/38	7086	4939
R37(76)	A-deal sheet, RKO and Schine, first run, Granville, N. Y., 12/27/38	7087	4940
	B-deal sheet RKO and Schine, first run, Granville, N. Y., 12/27/38	7088	4941
R37(77)	Deal sheet, no run, Carthage, N. Y., 8/15/38	7089	4942
R37(78)	Deal sheet, RKO and Schine, Rochester, N. Y., 11/28/39	7090	4943
R37(79)	Deal sheet, Rochester, N. Y., 11/28/39	7091	4944
R37(80)	Deal sheet, Rochester, N. Y., 11/28/39	7092	4945
R37(81)	Deal sheet, Rochester, N. Y., 4/1/41	7093	4946
R37(82)	Deal sheet, Syracuse, N. Y., 4/1/41	7094	4947
R37(83)	Deal sheet, Salisbury, Md., 10/9/40	7095	4948
R42	Agreement, RKO and Schine, 10/29/34	7096	4949
R43	Letter, RKO and Schine, 11/1/34	7098	4950
F1	Agreement, Fox and Schine, 8/5/36	7099	4951
F102	Deal sheet, Fox and Schine, 6/17/36, Hamilton, N. Y., 1st run	7103	4955
F103	Deal sheet, Fox and Schine, 6/17/36, Glens Falls, N. Y., 2nd run	7104	4956
F104	Deal sheet, Fox and Schine, 6/17/36, Herkimer, N. Y., 1st run	7105	4957
F105	Deal sheet, Fox and Schine, 6/17/36, Hudson Falls, 1st run	7106	4958
F106	Deal sheet, Fox and Schine, 6/17/36, Little Falls, N. Y.	7107	4959
F107	Deal sheet, Fox and Schine, 6/17/36, Malone, N. Y.	7108	4960
F108	Deal sheet, Fox and Schine, 6/17/36, Athens, O., 1st run	7109	4961
F109	Deal sheet, Fox and Schine, 6/17/36, Gloversville and Oneonta, 2nd run	7110	4962
F110	Deal sheet, Fox and Schine, 10/27/37, Fostoria, O.	7111	4963
F111	Deal sheet, Fox and Schine, 10/11/39, Medina, O.	7112	4964
F112	Deal sheet, Fox and Schine, 10/28/36, Watertown, Palace, 3rd run	7113	4965
F113	Deal sheet, Fox and Schine, 8/11/37, Perry, 1st run	7114	4966
F114	Deal sheet, Fox and Schine, 8/11/37, Penn Yan, 1st run	7115	4967
F115	Deal sheet, Fox and Schine, 4/27/37, Ilion, N. Y.	7116	4968

EXHIBITS PRINTED IN FULL—Continued

		Original	Print
F193	Agreement, Twentieth Century-Fox and Schine, 6/5/39	7116a	4969
C100	Agreement, Columbia and Schine, 10/17/38	7117	4971
C101	Letter, Columbia to Schine, 11/28/38	7119	4973
C102(1)	Deal Sheet, Columbia and Schine, second run, Auburn, N. Y., 10/17/38	7120	4975
C102(2)	Deal Sheet, first run, Bath, N. Y., 10/17/38	7121	4976
C102(3)	Deal sheet, subsequent run, Buffalo, N. Y., 10/17/38	7122	4977
C102(4)	Deal sheet, subsequent run, Buffalo, N. Y., 10/17/38	7123	4978
C102(5)	Deal sheet, first run, Canandaigua, N. Y., 10/17/38	7124	4979
C102(6)	Deal sheet, first run, Cortland, N. Y., 10/17/38	7125	4980
C102(7)	Deal sheet, first run, Geneva, N. Y., 10/17/38	7126	4981
C102(8)	Deal sheet, first run, Lockport, N. Y., 10/17/38	7127	4982
C102(9)	Deal sheet, second run, Lockport, N. Y., 10/17/38	7128	4983
C102(10)	Deal sheet, first run, Newark, N. Y., 10/17/38	7129	4984
C102(11)	Deal sheet, first run, Oswego, N. Y., 10/17/38	7130	4985
C102(12)	Deal sheet, first run, Penn Yan, N. Y., 10/17/38	7131	4986
C102(13)	Deal sheet, first run, Perry, N. Y., 10/17/38	7132	4987
C102(14)	Deal sheet, subsequent run, Rochester, N. Y., 10/17/38	7133	4988
C102(15)	Deal sheet, Subsequent run, Rochester, N. Y., 10/17/38	7134	4989
C102(16)	Deal sheet, subsequent run, Rochester, N. Y. 10/17/38	7135	4990
C102(17)	Deal sheet, subsequent run, Rochester, N. Y., 10/17/38	7136	4991
C102(18)	Deal sheet, repeat run, Rochester, N. Y., 10/17/38	7137	4992
C102(19)	Deal sheet, subsequent run, Rochester, N. Y., 10/17/38	7138	4993
C102(20)	Deal sheet, repeat run, Rochester, N. Y., 10/17/38	7139	4994
C102(21)	Deal sheet, first run, Salamanca, N. Y. 10/17/38	7140	4995
C102(22)	Deal sheet, first run, Seneca Falls, N. Y., 10/17/38	7141	4996
C102(23)	Deal sheet, "You Can't Take It With You"	7142	4997
C102(24)	Deal sheet, First run, Amsterdam, N. Y., 10/18/38	7144	4999
C102(25)	Deal sheet, first run, Ballston, N. Y., 10/17/38	7145	5000
C102(26)	Deal sheet, first run, Carthage, N. Y., 10/17/38	7146	5001
C102(27)	Deal sheet, first run, Glens Falls, N. Y. 10/17/38	7147	5002
C102(28)	Deal sheet, second run, Glens Falls, N. Y., 10/17/38	7148	5003
C102(29)	Deal sheet, first run, Gloversville, N. Y., 10/17/38	7149	5004
C102(30)	Deal sheet, first run, Hamilton, N. Y., 10/17/38	7150	5005

EXHIBITS PRINTED IN FULL—Continued

		Original	Print
C102(31)	Deal sheet, first run, Herkimer, N. Y., 10/17/38	7151	5006
C102(32)	Deal sheet, first run, Hudson Falls, N. Y., 10/17/38	7152	5007
C102(33)	Deal sheet, first run, Ilion, N. Y., 10/17/38	7153	5008
C102(34)	Deal sheet, first run, Little Falls, N. Y., 10/17/38	7154	5009
C102(35)	Deal sheet, first run, Malone, N. Y., 10/17/38	7155	5010
C102(36)	Deal sheet, first run, Mechanicville, N. Y. 10/17/38	7156	5011
C102(37)	Deal sheet, first run, Norwich, N. Y., 10/17/38	7157	5012
C102(38)	Deal sheet, first run, Ogdensburg, N. Y., 10/17/38	7158	5013
C102(39)	Deal sheet, first run, Oneonta, N. Y., 10/17/38	7159	5014
C102(40)	Deal sheet, first run, Saranac Lake, N. Y., 10/17/38	7160	5015
C102(41)	Deal sheet, first run, Tupper Lake, N. Y., 10/17/38	7161	5016
C102(42)	Deal sheet, first run, Watertown, N. Y., 10/17/38	7162	5017
C102(43)	Deal sheet, second run, Watertown, N. Y., 10/17/38	7163	5018
C102(44)	Deal sheet, first run, Whitehall, N. Y., 10/17/38	7164	5019
C102(45)	Deal sheet, first run, Easton, Md., 10/17/38	7165	5020
C102(46)	Deal sheet, first run, Federalsburg, Md., 10/17/38	7166	5021
C102(47)	Deal sheet, first run, Hurlock, Md., 10/17/38	7167	5022
C102(48)	Deal sheet, first run, Salisbury, Md., 10/17/38	7168	5023
C102(49)	Deal sheet, "You Can't Take It With You," Easton, Hurlock, Federalsburg, and Salisbury	7169	5024
C102(50)	Deal sheet, first run, Athens, Ohio, 10/17/38	7170	5025
C102(51)	Deal sheet, first run, Lexington, Ky., 10/17/38	7171	5026
C102(52)	Deal sheet, third run, Lexington, Ky., 10/17/38	7172	5027
C102(53)	Deal sheet, first run, Maysville, Ky., 10/17/38	7173	5028
C102(54)	Deal sheet, first run, Paris, Ky., 10/17/38	7174	5029
C102(55)	Deal sheet, first run, Piqua, Ohio, 10/17/38	7175	5030
C102(56)	Deal sheet, first run, Richmond, Ky., 10/17/38	7176	5031
C102(57)	Deal sheet, first run, Ashland, Ohio, 10/17/38	7177	5032
C102(58)	Deal sheet, first run, Bellefontaine, Ohio, 10/17/38	7178	5033
C102(59)	Deal sheet, first run, Bucyrus, Ohio, 10/17/38	7179	5034
C102(60)	Deal sheet, first run, Delaware, Ohio, 10/17/38	7180	5035
C102(61)	Deal sheet, first run, Fostoria, Ohio, 10/17/38	7181	5036
C102(62)	Deal sheet, first run, Kent or Ravenna, Ohio, 10/17/38	7182	5037
C102(63)	Deal sheet, repeat run, Kent or Ravenna, 10/17/38	7183	5038
C102(64)	Deal sheet, first run, Norwalk, Ohio, 10/17/38	7184	5039
C102(65)	Deal sheet, first run, Tiffin, Ohio, 10/17/38	7185	5040
C102(66)	Deal sheet, first run, Van Wert, Ohio, 10/17/38	7186	5041
C102(67)	Deal sheet, first run, Wooster, Ohio, 10/17/38	7187	5042

EXHIBITS PRINTED IN FULL—Continued

		Original	Print
C102(68)	Subsequent run, deal sheet, Rochester, N. Y., 12/28/39	7188	5043
C102(69)	Deal sheet, subsequent run, Rochester, N. Y., 12/28/39	7189	5044
C102(70)	Deal sheet, first run, Rochester, N. Y., 12/28/39	7190	5045
C102(71)	Deal sheet, after fourth run, Syracuse, N. Y., 9/28/39	7191	5046
C102(72)	Deal sheet, first run, Cambridge, Md., 4/11/39	7192	5047
C102(73)	Deal sheet, first run, Corbin, Ky., 9/28/39	7193	5048
C102(74)	Deal sheet, first and repeat runs, East Rochester or Fairport, N. Y., 9/28/39	7194	5049
C102(75)	Deal sheet, first run, Laurel, Del., 4/11/39	7195	5050
C102(76)	Deal sheet, first run, Maysville, Ky., 10/23/39	7196	5051
C102(77)	Deal sheet, first run, Middlesboro, Ky., 9/28/39	7197	5052
C102(78)	Deal sheet, first run, Milford, Del., 4/11/39	7198	5053
C102(79)	Deal sheet, second run, Lexington, Ky., 3/4/40	7199	5054
C102(80)	Deal sheet, "'You Can't Take It With You," 10/17/38	7200	5055
C102(81)	Deal sheet, first run, Bowling Green, Ohio, 9/29/39	7201	5056
C180	Agreement, Columbia and Schine, 11/19/40	7202	5057
C181(1)	Deal sheet, first run, Bath, N. Y., 11/19/40	7205	5061
C181(2)	Deal sheet, subsequent run, Buffalo, N. Y., 11/19/40	7206	5062
C181(3)	Deal sheet, subsequent run, Buffalo, N. Y., 11/19/40	7207	5063
C181(4)	Deal sheet, first run, Canandaigua, N. Y., 11/19/40	7208	5064
C181(5)	Deal sheet, first run, Corning, N. Y., 11/19/40	7209	5065
C181(6)	Deal sheet, first run, Cortland, N. Y., 11/19/40	7210	5066
C181(7)	Deal sheet, first run, East Rochester or Fairport, N. Y., 11/19/40	7211	5067
C181(8)	Deal sheet, repeat run, East Rochester or Fairport, N. Y., 11/19/40	7212	5068
C181(9)	Deal sheet, first run, Geneva, N. Y., 11/19/40	7213	5069
C181(10)	Deal sheet, first run, Lockport, N. Y., 11/19/40	7214	5070
C181(11)	Deal sheet, second run, Lockport, N. Y., 11/19/40	7215	5071
C181(12)	Deal sheet, first run, Newark, N. Y., 11/19/40	7216	5072
C181(13)	Deal sheet, first run, Oswego, N. Y., 11/19/40	7217	5073
C181(14)	Deal sheet, first run, Penn Yan, N. Y., 11/19/40	7218	5074
C181(15)	Deal sheet, first run, Perry, N. Y., 11/19/40	7219	5075
C181(16)	Deal sheet, subsequent run, Rochester, N. Y., 11/19/40	7220	5076
C181(17)	Deal sheet, second run, Rochester, N. Y., 11/19/40	7221	5077
C181(18)	Deal sheet, subsequent run, Rochester, N. Y., 11/19/40	7222	5078
C181(19)	Deal sheet, subsequent run, Rochester, N. Y., 11/19/40	7223	5079

EXHIBITS PRINTED IN FULL—Continued

		Original	Print
C181(20)	Deal sheet, subsequent run, Rochester, N. Y., 11/19/40	7224	5080
C181(21)	Deal sheet, subsequent run, Rochester, N. Y., 11/19/40	7225	5081
C181(22)	Deal sheet, subsequent run, Rochester, N. Y., 11/19/40	7226	5082
C181(23)	Deal sheet, second run, Rochester, N. Y., 11/19/40	7227	5083
C181(24)	Deal sheet, second run, Rochester, N. Y., 11/19/40	7228	5084
C181(25)	Deal sheet, subsequent run, Rochester, N. Y., 11/19/40	7229	5085
C181(26)	Deal sheet, subsequent run, Rochester, N. Y., 11/19/40	7230	5086
C181(27)	Deal sheet, first run, Salamanca, N. Y., 11/19/40	7231	5087
C181(28)	Deal sheet, first run, Seneca Falls, N. Y., 11/19/40	7232	5088
C181(29)	Deal sheet, first run, Cambridge, Md., 11/19/40.	7233	5089
C181(30)	Deal sheet, first run, Easton, Md., 11/19/40	7234	5090
C181(31)	Deal sheet, first run, Federalsburg, Md., 11/19/40	7235	5091
C181(32)	Deal sheet, first run, Milford, Del., 11/19/40	7236	5092
C181(33)	Deal sheet, first run, Salisbury, Md., 11/19/40.	7237	5093
C181(34)	Deal sheet, first run, Salisbury, Md., 10/8/40	7238	5094
C181(35)	Deal sheet, first run, Ashland, Ohio, 11/19/40	7239	5095
C181(36)	Deal sheet, first run, Bellefontaine, Ohio, 11/19/40	7240	5096
C181(37)	Deal sheet, first run, Bowling Green, Ohio, 11/19/40	7241	5097
C181(38)	Deal sheet, first run, Bucyrus, Ohio, 11/19/40	7242	5098
C181(39)	Deal sheet, first run, Delaware, Ohio, 11/19/40.	7243	5099
C181(40)	Deal sheet, first run, Fostoria, Ohio, 11/19/40	7244	5100
C181(41)	Deal sheet, first run, Kentor Ravenna, Ohio, 11/19/40	7245	5101
C181(42)	Deal sheet, repeat run, Kent or Ravenna, Ohio, 11/19/40	7246	5102
C181(43)	Deal sheet, first run, Norwalk, Ohio, 11/19/40	7247	5103
C181(44)	Deal sheet, first run, Tiffin, Ohio, 11/19/40	7248	5104
C181(45)	Deal sheet, first run, Van Wert, Ohio, 11/19/40.	7249	5105
C181(46)	Deal sheet, first run, Athens, Ohio, 11/19/40	7250	5106
C181(47)	Deal sheet, first run, Corbin, Ky., 11/19/40	7251	5107
C181(48)	Deal sheet, second run, Harlan, Ky., 11/19/40.	7252	5108
C181(49)	Deal sheet, first run, Lexington, Ky., 11/19/40.	7253	5109
C181(50)	Deal sheet, second run, Lexington, Ky., 11/19/40	7254	5110
C181(51)	Deal sheet, third run, Lexington, Ky., 11/19/40.	7255	5111
C181(52)	Deal sheet, second run on "Mr. Smith Goes to Washington," Lexington, Ky., 11/19/40	7256	5112
C181(53)	Deal sheet, first run, Maysville, Ohio, 11/19/40.	7257	5113
C181(54)	Deal sheet, first run, Middlesboro, Ky., 11,19,40	7258	5114

EXHIBITS PRINTED IN FULL—Continued

		Original	Print
C181(55)	Deal sheet, first run, Paris, Ky., 11/19/40	7259	5115
C181(56)	Deal sheet, first run, Piqua, Ohio, 11/19/40	7260	5116
C181(57)	Deal sheet, first run, Richmond, Ky., 11/19/40	7261	5117
C181(58)	Deal sheet, first run, Amsterdam, N. Y., 11/19/40	7262	5118
C181(59)	Deal sheet, first run, Ballston, N. Y., 11/19/40	7263	5119
C181(60)	Deal sheet, first run, Carthage, N. Y., 11/19/40	7264	5120
C181(61)	Deal sheet, first run, Glens Falls, N. Y., 11/19/40	7265	5121
C181(62)	Deal sheet, second run, Glens Falls, N. Y., 11/19/40	7266	5122
C181(63)	Deal sheet, first run, Gloversville, N. Y., 11/19/40	7267	5123
C181(64)	Deal sheet, second run, Gloversville, N. Y., 11/19/40	7268	5124
C181(65)	Deal sheet, first run, Granville, N. Y., 1/23/41	7269	5125
C181(66)	Deal sheet, first run, Hamilton, N. Y., 11/19/40	7270	5126
C181(67)	Deal sheet, first run, Herkimer, N. Y., 11/19/40	7271	5127
C181(68)	Deal sheet, first run, Hudson Falls, N. Y., 11/19/40	7272	5128
C181(69)	Deal sheet, first run, Ilion, N. Y., 11/19/40	7273	5129
C181(70)	Deal sheet, first run, Little Falls, N. Y., 11/19/40	7274	5130
C181(71)	Deal sheet, first run, Malone, N. Y., 11/19/40	7275	5131
C181(72)	Deal sheet, first run, Mechanicville, N. Y., 1/23/41	7276	5132
C181(73)	Deal sheet, first run, Odgensburg, N. Y., 11/19/40	7277	5133
C181(74)	Deal sheet, first run, Oneonta, N. Y., 11/19/40	7278	5134
C181(75)	Deal sheet, first run, Saranac Lake, N. Y., 11/19/40	7279	5135
C181(76)	Deal sheet, first run, Tupper Lake, N. Y., 11/19/40	7280	5136
C181(77)	Deal sheet, first run, Watertown, N. Y., 11/19/40	7281	5137
C181(78)	Deal sheet, second run, Watertown, N. Y., 11/19/40	7282	5138
C181(79)	Deal sheet, first run, Whitehall, N. Y., 11/19/40	7283	5139
S73	Agreement, Palace Lockport Corporation, et al. and N. Dipson, et al., 10/10/38	7284	5141
S74	Agreement, Jack Frisch, et al. and J. M. Schine, et al., 1/11/39	7285	5141
S75	Agreement, Charles Brown, et al., and Phoenix Amusement Company, 1/14/39	7286	5142
D1	Letter, Long to Schmertz, Fox, 11/8/35	7287	5143
D2	Letter, Long to McEvoy, RKO, 10/30/36	7288	5144
D3	Letter, Long to Schmertz, Fox, 4/4/35	7289	5145
D4	Letter, Long to Manager, RKO, 4/14/35	7290	5146
D5	Letter, Long to Drew, MGM, 4/20/38	7291	5147
D6	Letter, Drew to Long, 4/12/38	7292	5148
D7	Letter, Long to Mgr., Warners, 4/14/35	7293	5149

EXHIBITS PRINTED IN FULL—Continued

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D8	Letter, Long to McEvoy, RKO, 10/7/35	7294	5150
D9	Letter, Long to McEvoy, RKO, 10/30/35	7295	5151
D10	Contract recommendation for Memorial Theatre, Mt. Vernon, Ohio, 9/8/37	7296	5152
D12	Letter, Himmelein, Paramount, to Mrs. Moore, 1/5/36	7299	5153
D13	Letter, Moore to Silverman, 4/12/36	7300	5153
D14	Letter, Moore to May, 4/13/36	7302	5154
D15	Letter, Moore to Lazar, 5/12/36	7304	5154
D16	Letter, Moore to Lichter, (Fox) 6/1/36	7305	5155
D25	Contract, Angelas and Norwalk Theatre Corp., 5/19/39	7307	5155
D27	Letters, 1/18/40 and 2/3/40—United Artists to A. Felice	7311	5159
D38	Letter, 8/24/35, Charnas to Paramount	7313	5161
D43	Copy of resolution of stockholders of Bellefontaine Amusement Co.	7314	5161
D44	Agreement between Daniel Gutilla and Bellefontaine Amusement Co., 7/28/31	7315	5162
D46	Agreement, March 18, 1937, Yudelewitz, Willis and Belpik Theatre Corp. re lease of Princess and proposed new theatre	7317	5162
D50	Letter, Kaplan to Grafiades, 1/16/34	7320	5165
D51	Telegram, 1/30/34, Lichtman to Reliance	7321	5166
D52	Telegram, 1/31/34, Lichtman to Reliance	7322	5166
D53	Telegram, 2/26/34, Lichtman to Reliance	7323	5166
D54	Telegram, 5/10/34, Lichtman to Reliance	7324	5167
D55	Telegram, 6/12/34, Lichtman to Reliance	7325	5167
D56	Letter, 6/14/34, Bykowski to Grafiades	7326	5167
D57	Telegram, 6/23/34, Lichtman to Reliance	7327	5168
D58	Letter, 11/7/34, U. A. to Grafiades	7328	5168
D59	Letter, 1/18/35, Bykowski to Grafiades	7329	5169
D60	Letter, 9/21/35, Kaplan to Dickinson	7330	5169
D61	Letter, 11/13/35, Kelly to Reliance	7331	5170
D116	Photostat of Syracuse Post-Standard, Sept. 18, 1941	7332	5170
D120	Copy of letter, Lux to Wallace, 10/16/41	7333	5171
D122	Photograph of Capitol Theatre, Auburn, about 1/1/39	7334	5172
D130	Letter, Wallace to Paramount, 7/4/32	7335	5173
D131	Letter, Wallace to U. A., 6/22/23	7336	5174
D132	Letter, Fox to Wallace, 1/27/39	7338	5175
D133	Copy of letter, Boumansour to Department of Justice, April 4, 1941	7337	5176
D137	Salesman's report, 2/4/37, by Struwe	7339	5176
D138	Photograph of Smalley billboard on Gloversville, Johnstown road	7340	5176
D139	Photograph of Smalley billboard in Gloversville	7341	5176
D143	Letter, Picker to Smalley, 6/3/40	7342	5177
D144	Letter, Moross to Smalley, 11/13/39	7343	5178

EXHIBITS PRINTED IN FULL—Continued

		Original	Print
D145	Advertisement of Smalley's Norwich Theatre	7344	5179
D146	Photograph of Smalley's Norwich billboard showing 10¢–20¢ prices, Jan. 1942	7345	5180
D148B	Letter attached to contract of 7/13/35, Brand to Mooney	7346	5181
D148C	Agreement, 7/13/35, signed for Vitagraph by W. J. Brandt and State Bucyrus Co. by M. Bryer	7347	5181
D148E	Notification of cancellation, 12/2/35, house taken over by Schine. New contract cancels contract No. 4447 dated 7/13/35 attached to contract exhibit 148D re First National Product	7348	5182
D148F	Same for Warner product	7349	5182
D150	Memorandum showing cost of acquisition and improvements to various Schine theatres, etc.	7350	5183
D153	Copy of ordinance No. A of Board of Council, City of Paris, 10/5/37	7356	5185
D153A	Permit from City of Paris, 10/7/37	7358	5187
D154	Photostat of page from Bucyrus Telegraph—Forum, 9/6/35 showing advertisement of "Page Miss Glory" at State Theatre	7359	5188

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D156	Memorandum consisting of 1 sheet dated 10/3/41, written by Rowell—1st proposition	7360	5189
D157	Memorandum consisting of 1 sheet dated 10/3/41, written by Rowell—2nd proposition	7361	5189
D158	Memorandum consisting of 1 sheet dated 10/3/41, written by Rowell—3rd proposition	7362	5190
D163	Report (salesman) written by Rowell 10/10/41 re counter-proposition made by Rowell to to Wallace	7363	5190
D170	Copy of letter, Mooney (War) to Bryer, 9/9/35	7364	5190
D171	Percentage engagement report on Page Miss Glory at State, Bucyrus on 9/8–10/35—signed by M. Bryer and refers to contract No. 4447	7365	5190
D173	Warner Bros. and First National exhibition contract with Belpik Theatre Corp., Medina, Ohio, 10/27/37	7367	5190
D174	Copy of telegram, Himes to Lauer, 6/15/38	7369	5191
D176	Letter, Lauer to Himes, 6/16/38	7370	5191
D177	Copy of letter, Himes to Lauer, 6/17/38	7372	5192
D178	Letter, Lauer to Himes, 6/23/38	7373	5193

EXHIBITS PRINTED IN PART

		Original	Print
81	Lease, 2/14/41, Boumansour and Schine, Plaza, Malone	7374	5193
83	Agreement, 8/23/40, Croucher and Schine, re Crescent, Newark	7381	5193
85	Agreement, 5/27/37, Young and Whitney, Inc. and Perry Theatrical Corp., re Ilion	7386	5195
96	Agreement, Shreffler and Belpik, re Shelby, Ohio, 9/21/37	7406	5196
111	Agreement, 8/12/38, Chesapeake and Insley-employment	7412	5200
118	Agreement, 9/29/38, Chesapeake Theatres Corp. and Gollner-employment, Salisbury	7419	5203
644A	Warner letter agreements (1934/5 season) and deal sheets	7426	5206
646	Lease, Gutilla and Schine Theatrical Co., Inc., April 30, 1938, covering Strand Theatre, Bellefontaine, Ohio	7435	2512
647	Lease, Gutilla and Schine Theatrical Co., Inc., July 1, 1940, covering Strand theatre, Bellefontaine, Ohio	7551	5214
806	Copy of newspaper page, Canandaigua "Daily Message," 5/10/38	7450	5217
807	Copy of newspaper page, Perry Record, 7/11/35.	7451	5218
811	Lease, Syracuse-Strand to S. K. E., 8/24/39 (2 yrs.)	7452	5219
854	Salamanca Republic, 12/24/38	7472	5221
871	Agreement, Y. & W., Inc. and Perry Theatre Corp., 12/10/36	7473	5221
872	Agreement, Whitney & Pierce and J. G. Selmser, 5/24/37	7476	5223
883	Proposed lease, City of Ogdensburg to L. Carkey, 9/28/40, unsigned	7479	5225
910	Lease, S. Boal and Sidney Theatre Corp., 5/16/31, Bijou, Piqua, Ohio, to 6/30/34	7486(1)	5226
911	Lease, Boal Estate to Belpik Theatre Corp., 2/23/34, Bijou, Piqua, Ohio, to 2/28/36	7487	5227
912	Lease, Boal Estate to Belpik Theatre Corp., 2/15/36, Bijou, Piqua, Ohio, to 2/28/38	7491(1a	5229
913	Lease, Boal Estate to Belpik Theatre Corp., 11/27/37, Bijou, Piqua, Ohio, to 2/28/40		
914	Lease, Boal Estate to Belpik Theatre Corp., 1/10/40, Bijou, Piqua, Ohio, to 2/28/45	7492	5230
915	Lease and option to purchase, Landry, et al. to Schine Chain Theatres, Inc., 10/25/41, Star, Ogdensburg, to 9/6/46	7497	5232
916	Lease and option to purchase, Ogdensburg Theatre Co. to Schine Chain Theatres, Inc., 8/20/36, Star, Ogdensburg, to 9/5/41	7513	5234

EXHIBITS PRINTED IN PART—Continued

		Original	Print
917	Lease, Ogdensburg Strand Theatre Co. and Schine Chain Theatres, Inc., 9/6/26, Star, Ogdensburg, to 9/5/36	7525(1)	5236
918	Lease, Henry and Reb. Pehl to J. Steel and Wm. Selman, 10/31/34, Forum, Norwalk, to 2/31/44	7526	5237
919	Agreement, Pohl and Norwalk Theatre Corp., Jan. 5, 1942, cancels Forum, Norwalk lease	7536	5239
920	Lease, G. W. Croucher and Newark Theatres, Inc., 4/15/26, Crescent, Newark, to 4/14/31	7540	5239
921	Lease, Rose Croucher and Dominion Operating Co., Ltd., 5/15/34, Crescent, Newark, to 9/30/36	7544	5239
922	Extension agreement, Rose Croucher and Dominion Operating Co., Ltd., 5/14/36, Crescent, Newark, to 9/30/41	7546	5240
923	Lease, J. J. Lanigan and Hi-Art Theatre Corp., 1/8/26, Hi-Art, Lockport, to 1/9/36	7548	5241
924	Lease, J. J. Lanigan and Schine Theatrical Co., Inc., 5/25/33, Hi-Art, Lockport, to 1/9/36	7569	5242
925	Option to renew, J. J. Lanigan and Schine Theatrical Co., Inc., 10/5/33, Hi-Art, Lockport, to 1/9/41	7588	5242
926	Agreement, J. J. Lanigan and Schine Theatrical Co., Inc., 12/31/37, Hi-Art, Lockport, to 1/9/51	7591	5243
927	Lease, Odd Fellows Temple Ass'n. and Schine Theatrical Co., Inc., 6/29/36, Hippodrome, Little Falls, to 6/30/41	7597	5244
928	Agreement, United Odd Fellows Ass'n. and Schine Ilion Corp., 4/18/42, Temple, Ilion, to 5/4/47	7607	5246
929	Lease Charles and C. W. Mickey to C. M. Kahn, 6/25/35, Roxy, Fostoria, Ohio, to 6/30/40	7610	5248
930	Lease, Charles and C. W. Mickey to Fostoria Theatre Corp., 6/11/40, Roxy, Fostoria, Ohio, to 6/30/45	7614	5251
931	Lease, National City Bank of Cleveland, Trustee to Crawford Theatre Co., 4/1/36, Southern, Bucyrus, Ohio, to 3/31/41	7621	5252
932	Lease, National City Bank of Cleveland, Trustee to Crawford Theatre Co., 4/1/41, Southern, Bucyrus, Ohio, to 3/31/43	7631	5253
933	Lease, Opera Block Co. to Schine Theatrical Co., Inc., 8/1/33, Opera House, Bellefontaine, to 8/31/34	7640	5254
934	Lease, Opera Block Co. to Schine Theatrical Co., Inc., 8/3/37, Opera House, Bellefontaine, to 8/31/38	7646	5255

EXHIBITS PRINTED IN PART—Continued

		Original	Print
935	Lease, Opera Block Co. to Schine Theatrical Co., Inc., 8/31/38, Opera House, Bellefontaine, to 8/31/39	7653	5255
936	Lease, Opera Block Co. to Schine Theatrical Co., Inc., 8/31/39, Opera House, Bellefontaine, to 8/31/40	7658	5256
146	Contract, United Artists—Schine—undated rider—"My son, Monte Cristo, Two Years Before Mast, Valentino"	7844	5353
155	Contract, United Artists—Schine, undated rider—"Great Dictator"	7847	5356
159	Contract, United Artists—Schine, undated rider—"Westerner"	7849	5358
192	Contract, Group K-4, dated December 15, 1936, Kentucky or Ben Ali or Strand or State theatres, Lexington, Kentucky. Contract dated Feb. 17, 1937, Hippodrome or Kentucky Theatres, Corbin, Kentucky	7855	5364
268	Contract, Group S-11 for New or Ulman's Theatre, Salisbury, Maryland, dated July 18, 1939	7856	5365
324(A-C)	Fox contracts for Norwich, Amsterdam, Little Falls, Massena, Norwalk, Tiffin, Mt. Vernon, Corbin, Paris, Van Wert, Bucyrus	7857	5366
326(A-I)	Fox contracts for Corning	7864	5373
328(A-D)	Fox contracts for Watertown	7873	5382
330(A-C)	Fox contract for Van Wert	7878	5387
333(A-)	Fox contract for Lexington	7881	5390
339(A-J)	Paramount contracts for Auburn, Norwich, Amsterdam, Little Falls, Tiffin, Corbin, Paris, Van Wert, Bucyrus, Delaware	7882	5391
341(A-E)	Paramount contracts for Corning	7893	5402
343(A-G)	Paramount contracts for Watertown	7898	5407
344(A-C)	Paramount contracts for Van Wert, Ohio	7905	5414
563	Contract for First National Pictures for Colonial Theatre dated May 18, 1936	7908	5417
569	Contract with Belpik Theatres Corp. relative to the Civic or Roxy Theatres with Warner Bros., dated October 21, 1936	7909	5418
604(A-J)	Loew's contracts for Bucyrus, Van Wert, Tiffin, Medina, Mt. Vernon, Corbin, Lockport, Norwich, Amsterdam, Massena, Little Falls	7910	5419
611(A-B)	Loew's contracts for Corning	7922	5431
613(A-B)	Loew's contracts for Watertown	7925	5434
622A	RKO contracts for unspecified town, Norwalk, Van Wert, Tiffin, Corbin, Paris, Shelby, Mt. Vernon, Delaware, Bucyrus, Auburn, Norwich, Amsterdam, Little Falls	7927	5436
628(A-F)	Photostats of RKO contracts for Corning, N. Y., 1933-34 and 1934-35 seasons	7928	5437

EXHIBITS PRINTED IN PART—Continued

		Original	Print
635(A-K)	Warner contracts for Auburn, Norwich, Amsterdam, Little Falls, Norwalk, Van Wert, Fostoria, Medina, Tiffin, Corbin, Paris	7934	5443
637(A-H)	Warner contracts for Corning	7952	5461
642(A)	Warner contracts for Cumberland, St. Michaels, Easton, Maysville, Federalsburg, Hurlock, Harlan, Salisbury, Richmond, Paris, Corbin.	7971	5480
672(A-F)	Columbia contracts for Norwalk, Van Wert, Tiffin, Corbin, Paris, Delaware, Norwich, Amsterdam, Little Falls, Ashland	7972	5481
698(A & B)	Contracts Universal and Schine, State Theatre, Corning, 1933–34	7978	5487
698(c)	Contract Universal and Gaby & Cohen, Plaza Theatre, Corning, 1933–34	7980	5489
720	Contract, Warner Bros. & Fenyvessy, Madison, 7/20/31	7981	5490
721	Contract, First National & Fenyvessy, Madison, 7/20/31	7982	5491
722	Contract, Warner Bros. & Fenyvessy, Madison, 11/14/32	7983	5492
723	Contract, First National & Fenyvessy, Madison, 11/14/32	7984	5493
724	Contract, Warner Bros. & Fenyvessy, Madison, 11/20/33	7985	5494
725	Contract, First National & Fenyvessy, Madison, 11/20/33	7986	5495
726	Contract, RKO & Fenyvessy, Madison, 1/15/31	7987	5496
727	Contract, RKO & Fenyvessy, Madison, 1/15/31	7988	5497
728	Contract, RKO & Fenyvessy, Strand and Madison, 9/28/32	7989	5498
729	Contract, RKO & Fenyvessy, Madison, 12/8/33	7990	5499
730	Contract, RKO & Fenyvessy, Monroe, 12/8/33	7991	5500
731	Contract, RKO & Fenyvessy, 1935–36, Monroe, 1/25/35	7992	5501
732	Contract, RKO & Fenyvessy, 1935–36, Madison, 1/16/35	7993	5502
733	Contract, Paramount and Fenyvessy, Madison, 12/11/31	7994	5503
734	Contract, Paramount and Fenyvessy, Madison, 3/2/33	7995	5504
735	Contract, Paramount and Fenyvessy, Monroe, 10/29/34	7996	5505
736	Contract, Paramount & Fenyvessy, Madison, 10/29/34	7997	5506
737	Contract, Loew's & Fenyvessy, 1934–35, Monroe, 11/28/34	7998	5507
738	Contract, Loew's & Fenyvessy, 1934–35, Madison, 11/28/34	7999	5508
739	Contract, Loew's & Fenyvessy, 1935–36, Madison, 10/11/35	8000	5509

EXHIBITS PRINTED IN PART—Continued

		Original	Print
740	Contract, Loew's & Fenyvessy, 1935–36, Monroe, 10/11/35	8001	5510
741	Contract, Loew's & Fenyvessy, 1937–38, Madison, 6/23/38	8002	5511
742	Contract, Loew's & Fenyvessy, 1937–38, Monroe, 6/23/38	8003	5512
743	Contract, Loew's & Fenyvessy, 1938–39, Madison, 6/23/38	8004	5513
744	Contract, Loew's & Fenyvessy, 1938–39, Monroe, 6/23/38	8005	5514
745	Contract, Fox and Fenyvessy, 1932–33, Madison, 10/2/32	8006	5515
746	Contract, Fox and Fenyvessy, 1933–34, Madison, 8/18/33	8007	5516
747	Contract, Fox and Fenyvessy, 1933–34, Monroe, 8/18/33	8008	5517
748	Contract, Fox and Fenyvessy, 1934–35, Monroe, 3/20/35	8009	5518
749	Contract, Fox and Fenyvessy, 1934–35, Madison, 3/20/35	8010	5519
750	Contract, Columbia and Fenyvessy, 1937–38, Monroe, 6/18/37	8011	5520
751	Contract, Columbia and Fenyvessy, 1936–37, Madison, 11/2/36	8012	5521
752	Contract, Warner and Fenyvessy, after Schine Madison, 10/11/35	8013	5522
753	Contract, Warner and Fenyvessy, Monroe, 12/10/37	8014	5523
754	Contract, Warner and Fenyvessy, Madison, 12/10/37	8015	5524
755	Contract, RKO and Fenyvessy, Madison, 12/7/36	8016	5525
756	Contract, RKO and Fenyvessy, Monroe, 12/7/36	8017	5526
757	Contract, Loew's—Liberty, 10/11/34	8018	5527
758	Contract, Loew's—Dixie or State, 10/11/34	8019	5528
759	Contract, Loew's—State or Dixie, 10/11/34	8020	5529
760	Contract, Loew's—Riviera or Liberty, 10/12/34	8021	5530
761	Contract, Loew's—State or Dixie, 7/26/35	8022	5531
762	Contract, Loew's State or Dixie, 7/26/35	8023	5532
763	Contract, Loew's Liberty, 7/26/35	8024	5533
764	Contract, Loew's Riviera or Liberty, 7/26/35	8025	5534
779	Contract, RKO and Fenyvessy, Madison, 11/30/32	8026	5535
780	Contract, RKO and Fenyvessy, Monroe, 1/14/32	8027	5536
781	Contract, RKO and Fenyvessy, Madison, 1/14/38	8028	5537
782	Contract, RKO and Fenyvessy, Monroe, 9/15/38	8029	5538

EXHIBITS PRINTED IN PART—Continued

		Original	Print
783	Contract, RKO and Fenyvessy, Madison, 9/15/38	8030	5539
784	Contract, Fox and Fenyvessy, 12/8/31	8031	5540
785	Contract, MGM–Fenyvessy, 1/15/37	8032	5541
786	Contract, Warner–First National and Fenyvessy, 11/5/36	8033	5542
787	Contract, Warner–First National and Fenyvessy, 11/5/36	8034	5543
788	Contract, Warner–First National and Fenyvessy, 1/30/35	8035	5544
789	Contract, First National and Fenyvessy, 1/30/35	8036	5545
791	Contract, 1/6/39, Columbia and Fenyvessy, Madison	8037	5546
792	Contract, 1/6/39, Columbia and Fenyvessy, Monroe	8038	5547
793	Contract, Columbia and Belinson, Little, Craig's Wife—Theodora Goes Wild—2nd Pennies from Heaven	8039	5548
794	Contract, Columbia and Belinson, Little, When You Are in Love—2nd	8040	5549
795	Contract, Columbia and Belinson, Little, Holiday—2nd	8041	5550
796	Contract, Columbia and Belinson, Little, Awful Truth—2nd	8042	5551
797	Contract, Columbia and Belinson, Little, Lost Horizon—2nd	8043	5552
798	Contract, Columbia and Belinson, Little, You Can't Take It With You—2nd	8044	5553
799	Contract, Columbia and Belinson, Little, Mr. Smith Goes to Washington—2nd	8045	5554
813	Contract, RKO and Auburn Capitol Theatrical Corp., Capitol, Auburn, 11/15/32	8046	5555
814	Contract, Paramount and Auburn Capitol Theatrical Corp., Capitol, Auburn, 3/3/34	8047	5556
829	Photostatic copy of Fox contract, 8/6/37	8048	5557
840	Contract, Fox and Vournakis, 10/21/35, 1935–36	8049	5558
841	Contract, Fox and Vournakis, 6/22/36, 1936–37	8050	5559
842	Contract, Fox and Vournakis, 11/2/36, 1936–37	8051	5560
847	Contract, Fox and Vournakis, 10/4/33, 1933–34	8052	5561
848	Contract, Warner and Vournakis, 11/20/33, 1933–34, Strand	8053	5562
849	Contract, Warner and Vournakis, 11/8/35, 1935–36, Strand	8054	5563
850	Contract, Warner and Vournakis, 12/7/36, 1936–37, Strand	8055	5564
851	Contract, Warner and Vournakis, 10/18/37, 1937–38, Strand	8056	5565
852	Contract, Warner and Vournakis, 9/18/39, 1939–40, Strand	8057	5566

EXHIBITS PRINTED IN PART—Continued

		Original	Print
853	Contract, Warner and Vournakis, 11/22/40, 1940–41, Strand	8058	5567
937	Lease, Opera Block Co. to Schine Theatrical Co., Inc., 8/14/40, Opera House, Bellefontaine, to 8/31/41	7664	5256
938	Lease, Opera Block Co. to Schine Theatrical Co., Inc., 8/18/41, Opera House, Bellefontaine, to 8/31/42	7669	5256
939	Lease, Dan Gutilla and Schine Enterprises, Inc., 7/28/31, Strand, Bellefontaine, to 6/1/34	7675	5256
940	Lease, Dan Gutilla and Schine Treatrical Co., Inc., 3/29/34, Strand, Bellefontaine, to 6/1/36	7681	5258
941	Lease, Dan Gutilla and Schine Theatrical Co., Inc., 5/22/36, Strand, Bellefontaine, to 6/1/38	7685	5259
942	Lease, Thos. Osborne to M. A. Shea, 3/9/18, Jefferson, Auburn, to 10/15/28	7690	5261
943	Lease, Thos. Osborne Estate to M. A. Shea, 8/5/29, Jefferson, Auburn, to 10/15/34	7696	5261
944	Lease, M. A. Shea to Upstate Amusement Co., 5/5/37, Jefferson, Auburn, to 10/15/41	7702	5262
945	Lease, Osborne Estate to Upstate Amusement Co., 7/9/38, Jefferson, Auburn, to 5/15/48	7712	5263
946	Agreement, Hi-Art Theatre Corp. and Lockport Enterprises, Inc., 10/1/27, Assigns lease of Hi-Art, Lockport, N. Y.	7716	5264
947	Lease, J. & S. Palfi to Sidney Theatre Corp., 5/20/36, Opera House, Kent, Ohio, to 5/31/41	7720	5265
960	Lease, 9/16/33, City of Wooster to Wooster Theatres, Inc., Opera House, Wooster, Ohio, to 8/31/35	7724	5266
961	Agreement, 10/3/35, City of Wooster to Wooster Theatres, Inc., Opera House, Wooster, Ohio, extends lease to 8/31/38	7730	5271
962	Lease, pursuant to resolution of 4/4/38, City of Wooster to Wooster Theatres, Inc., Opera House, Wooster, Ohio, to 8/31/41	7733	5273
982	Lease, Bates Estate to G-C Theatre Corp., 6/15/33, Richardson, Oswego, and exercise of option to 7/31/38	7736	5275
983	Lease, Bates Estate to G-C Theatre Corp., 7/5/38, Richardson, Oswego, and exercise of option to 7/31/40	7741	5277
984	Lease, Bates Estate to G-C Theatre Corporation, 6/17/40, Richardson, Oswego, and exercise of option to 7/31/40	7747	5277
1008	Agreement 11/6/41, between Pohe and Norwalk Theatre Corp.	7749	5277
S68	Agreement, J. M. Schine, et al. and M. A. Shea, 8/16/35, re purchase of one-half interest, Amsterdam, N. Y.	7754	5281

EXHIBITS PRINTED IN PART—Continued

		Original	Print
S69	Agreement, Bieberson and Belpik Theatre Corp., 1/17/36, re purchase of one-half interest in Athens, Ohio	7762	5285
S70	Agreement, Bieberson and Schine Delaware Corporation, 1/17/36, re purchase of one-half interest	7766	5287
S71	Agreement, J. M. Schine, et al. and Maurice A. Shea, 8/16/37, re purchase of Shea interest	7769	5289
S72	Bill of sale, John Buchmann to Schine Delaware Corp., 3/21/38	7778	5293
S76	Agreement, Hoppes and Chesapeake Theatre Corporation, 7/16/40, re purchase of Wicomico, Salisbury, Md.	7785	5294
S77	Bill of Sale, Jos. Constantino to Schine Theatre Company, Inc.	7790	5299
D112	Map of City of Rochester showing location of theatres	7793	5302

DIGESTS OF LICENSE CONTRACT EXHIBITS

Statement re digests of License Contract Exhibits		7794	5303
P14	Contract, Paramount 1938-38—11/4/38—Mt. Vernon	7795	5304
P15	Contract, Paramount 1939-40, 1940-41—Mt. Vernon, second run	7797	5306
P19	Contract, Scott—Universal—First run	7798	5307
P23	Contract, 9/1/39, Columbia—Murphy	7799	5308
P24	Contract, 9/1/39, Columbia—Murphy	7800	5309
P27	Contract, 9/21/39, Metro—Schine, Kentucky Theatre, Corbin	7801	5310
P28	Contract, 12/1/38, Paramount—Schine, Hippodrome or Kentucky	7802	5311
P29	Contract, 6/6/39, Fox—Schine, Corbin	7803	5312
P30	Contract, 6/6/39, Fox—Schine, Corbin	7805	5314
P31	Contract, 1/23/39, Fox—Schine, Corbin	7806	5315
P37	Contract, 11/10/38, Universal—Schine, Corbin	7807	5316
P42	Contract, 12/2/38, Fox—Schine, Corbin	7808	5317
P61	Contract, 9/28/35, MGM—Bryer	7809	5318
P62	Contract, Warners—Schine, 7/25/35, Bucyrus	7811	5320
P66	Contract, Fox—Charnas, 8/20/34, Southern, Bucyrus	7812	5321
P67	Contract, Fox—Schine, 8/5/35, Bucyrus	7813	5322
P68	Contract, Fox and Schine, 8/5/35, Bucyrus	7814	5323
P69	Contract, Paramount—Charnas, 9/11/34, Bucyrus	7815	5324
P70	Contract, Paramount—Schine, 9/17/35, Bucyrus	7816	5325
122	Contract, United Artists—Schine—8/22/33—"I Knew Her When"	7818	5327
126	Contract, United Artists—Schine, 11/18/35—"Call of the Wild"	7821	5330

DIGESTS OF LICENSE CONTRACT EXHIBITS—Continued

		Original	Print
128	Contract, United Artists—Schine, 11/18/35—"Dark Angel"	7823	5332
129	Contract, United Artists—Schine, 10/2/35—"Barbary Coast"	7825	5334
131	Contract, United Artists—Schine—undated rider—"Garden of Allah, Star is Born and untitled Colman"	7830	5339
135	Contract, United Artists and Schine—undated rider—"Vogues"	7833	5342
138	Contract, United Artists and Schine—undated rider—"Goldwyn Follies, Hurricane, Marco Polo"	7836	5345
140	Contract, United Artists—Schine—undated rider—"Stella Dallas, Dead End"	7838	5347
141	Contract, United Artists—Schine—undated rider—"Cowboy and Lady, Lost Frontier, Daring Age"	7841	5350
863	Contract, Warners and Boumansour	8059	5568
865	Contract, Paramount to Y & W Inc., 8/20/35, Capitol, Ilion	8060	5569
866	Contract, Paramount to Y & W Inc., The Crusades, undated	8061	5570
867	Contract, Columbia to Y & W Inc., (application undated)	8062	5571
868	Contract, Warners & First National and Y & W Inc., 10/17/35, 1935-36	8063	5572
869	Contracts (5), United Artists & Y & W Inc., 2/1/36, These Three, Strike Me Pink, Splendor, Barbary Coast and Dark Angel	8064	5573
870	Contracts (2), RKO—Y & W Inc., 1/20/36	8065	5574
874(A-D)	Contracts (4), RKO—Y & W Inc., 1932/33, 33/34, 34/35, 1936/37	8066	5575
875(A-E)	Contract, Warner—Y & W, Inc., 1932-33, 2/6/33	8070	5579
	Contract, First National—Y & W, Inc., 1932-33, 2/6/33	8071	5580
	Contract, First National—Y & W, Inc., 1933-34, 10/28/33	8072	5581
	Contract, Warner—Y & W, Inc., 1933-34, 10/28/33	8073	5582
	Contract, First National—Y & W, Inc., 1934-35, 10/11/34	8074	5583
	Contract, Warner—Y & W, Inc., 1934-35, 10/11/34	8075	5584
	Contract, Warner—First National—Y & W, Inc., 1935-36, 10/17/35	8076	5585
	Contract, Warner—First National—Y & W, Inc., 1936-37, 8/31/36	8077	5586
876(A-D)	Contracts (4), MGM—Y & W, Inc., 1933/34, 34/35, 35/36, 36/37	8078	5587

DIGESTS OF LICENSE CONTRACT EXHIBITS—Continued

		Original	Print
877(A-E)	Contracts (5), Fox—Y & W, Inc., 1933–34, 34/35, 35/36, 35/36, 36/37	8082	5591
878(A-E)	Contracts (5), Paramount—Y & W, Inc., 1932/33, 33/34, 34/35, 35/36, 36/37	8087	5591
905(A-E)	Contracts (5), Paramount and Boumansour	8092	5601
906(A-H)	Contracts (8), Loew's Inc., and Boumansour	8097	5606
907(A-E)	Contracts (5), RKO and Boumansour, 1936/37, 37/38, 38/39, 39/40	8105	5614
908(A-E)	Contracts (5), Vitagraph, Inc. and Boumansour, 1938/39, 39/40	8110	5619
909	Contract, Vitagraph, Inc. and Boumansour, app. 6/14/37	8115	5624
948	Contracts (2), War. & F. N. with State-Bucyrus, 8/20/34	8116	5625
949	Contract, MGM and Long, Memorial, Mt. Vernon, 1937–38, 5/31/38	8118	5627
950	Contract, MGM and Long, 5/31/38, Memorial, Mt. Vernon, 1938–39	8119	5628
951	Contract, MGM and Long, 12/14/36, Memorial, Mt. Vernon, 1936–37	8120	5629
952	Contract, MGM and Long, Memorial, Mt. Vernon, 1936–37, Great Ziegfield	8121	5630
953	Contract, Columbia and Schine, Forum, Norwalk, 1936–37	8122	5631
954	Contract, Columbia and Frederick, Moose, Norwalk, 1935–36	8123	5632
955	Contract, Columbia and Schine, Colonial, Norwich, N. Y. 1936–37	8124	5633
956	Contract, Columbia and Garl Moore, Ohio, Van Wert, 1935–36	8125	5634
957	Contract, Columbia and Schine, Van Wert or Strand, 1936–37, 10/5/36	8126	5635
963	Contract, Fox & S. K. E., 10/14/41, Paramount, Strand, 8/8/41	8127	5636
964	Contract, Fox & S. K. E., 10/14/41, Eckel (move-over)	8128	5637
965	Contract, Fox and Syracuse Cameo Theatre, Inc., 9/25/41, Cameo	8129	5638
966	Contract, Fox and Syracuse Novelty Theatre, Inc., 9/24/41, Novelty	8130	5639
967	Contract, Fox and Syracuse Happy Hour Theatre, Inc., 9/24/41, Happy Hour	8131	5640
968	Contract, Fox and Larkin, 9/24/41, Harvard	8132	5641
969	Contract, Fox and Theatorium Co., 10/17/41, Turn Hall	8133	5642
970	Contract, Fox and Sidney Grossman, 10/25/41, Elmwood	8134	5643
971	Contract, Fox and Corrin, 10/30/31, Alcazar	8135	5644
972	Contract, Fox and Merriman, 10/30/31, Franklin	8136	5645

DIGESTS OF LICENSE CONTRACT EXHIBITS—Continued

		Original	Print
973	Contract, Fox and Matty Dale Amusement Corp., 10/30/31, Hollywood	8137	5646
974	Contract, Fox and Stotnick & Cantor, 12/18/41, Acme	8138	5647
975	Contract, Fox and Stotnick, 12/18/41, Globe	8139	5648
976	Contract, Fox and Stotnick, 1/12/42, Grant	8140	5649
977	Contract, Fox and Davidson, 1/21/42, Avon	8141	5650
978	Contract, Fox and Erin Theatre Co., 4/13/42, Erin	8142	5651
979	Contract, Fox and Kallett, Regent, Syracuse	8143	5652
981(1-81)	Contracts, Loew's and Schine, 9/6/40, 1940–41 (81)	8144	5653
981(82-83)	Contracts (2), Loew's and Schine, 11/22/40, 1940–41	8224	5734
W6(1-17)	First run contracts (17), 4/3/36	8262	5736
W6(19-41)	First run contracts (22)	8243	5753
W8(1-2)	First run contracts (2), 8/16/35	8266	5776
W8(3)	First run contract (1), 8/8/35	8268	5778
W8(4-17)	First run contracts (13), 8/16/35	8269	5779
W33(16)	Contracts, First National–Warner–Schine, Rochester, 9/11/34	8283	5793
W33(17)	Contracts, First National–Warner–Schine, Rochester, 9/11/34	8285	5795
W18	Contract, Warner Bros.–First National & Schine, 8/5/35, Liberty or Riviera, Rochester, N. Y.	8287	5797
W19	Contract, Warners–First Nat'l & Schine, 8/5/35, State or Dixie, Rochester, N. Y.	8288	5798
R3	Contract, RKO and Schine, 11/20/36, Auburn, N. Y.	8289	5799
R4	Contract, Bath, N. Y., 11/12/34	8290	5800
R5	Contract, Canandaigua, N. Y., 11/12/34	8291	5801
R6	Contract, Carthage, N. Y., 11/12/34	8292	5802
R7	Contract, Corning, N. Y., 11/12/34	8293	5803
R8	Contract, Cortland, N. Y., 11/12/34	8294	5804
R9	Contract, Geneva, N. Y., 11/12/34	8295	5805
R10	Contract, Glens Falls, N. Y., 11/12/34	8296	5806
R11	Contract, Gloversville, N. Y., 11/12/34	8297	5807
R12	Contract, Hamilton, N. Y., 3/29/35	8298	5808
R13	Contract, Herkimer, N. Y., 11/12/34	8299	5809
R14	Contract, Little Falls, N. Y., 11/12/34	8300	5810
R15	Contract, Lockport, N. Y., 11/12/34, (first run)	8301	5811
R16	Contract, Lockport, N. Y., 11/12/34, (second run)	8302	5812
R17	Contract, RKO–Schine, 1934–35, Malone, Malone, N. Y.	8303	5813
R18	Contract, Massena, N. Y., 11/12/34	8304	5814
R21	Contract, Ogdensburg, N. Y., 11/12/34	8305	5815
R22	Contract, Oneonta, N. Y., 11/14/34	8306	5816
R23	Contract, Oswego, N. Y., 11/12/34	8307	5817

DIGESTS OF LICENSE CONTRACT EXHIBITS—Continued

		Original	Print
R24	Contract, Rochester, N. Y., 11/12/34, (repeat run)	8308	5818
R25	Contract, Rochester, N. Y., 11/12/34, (third run)	8309	5819
R26	Contract, Rochester, N. Y., 11/12/34, (repeat run)	8310	5820
R27	Contract, Rochester, N. Y., 11/12/34, (Subsequent run)	8311	5821
R28	Contract, Salamanca, N. Y., 11/12/34	8312	5822
R29	Contract, Saranac Lake, N. Y., 11/12/34	8313	5823
R30	Contract, Tupper Lake, N. Y., 5/22/35	8314	5824
R31	Contract, Watertown, N. Y., 11/14/34	8315	5825
R32	Contract, Bellefontaine, Ohio, 12/19/34	8316	5826
R33	Contract, Piqua, Ohio, 12/19/34	8317	5827
R34	Contract, Wooster, Ohio, 12/19/34	8318	5828
P168	First run contract, Ballston, N. Y., 9/27/40	8319	5829
P169	First run contract, Carthage, N. Y., 9/27/40	8320	5830
P170	First run contract, Hamilton, N. Y., 9/27/40	8321	5831
P171	First run contract, Saranac Lake, N. Y., 9/27/40	8322	5832
P172	First run contract, Whitehall, N. Y., 9/27/40	8323	5833
P173	First run contract, Salamanca, N. Y., 9/27/40	8324	5834
P174	First run contract, Bath, N. Y., 9/27/40	8325	5835
P175	First run contract, Canandaigua, N. Y., 9/27/40	8326	5836
P176	First run contract, Perry, N. Y., 9/27/40	8327	5837
P177	First run contract, Oswego, N. Y., 9/27/40	8328	5838
P178	Second run contract, Oswego, N. Y., 9/27/40	8329	5839
P179	First run contract, Hurlock, Md., 9/27/40	8330	5840
P180	First run contract, Easton, Md., 9/27/40	8331	5841
P181	First run contract, Cambridge, Md., 9/27/40	8332	5842
P182	First run contract, Richmond, Ky., 9/30/40	8333	5843
P183	First run contract, Paris, Ky., 9/30/40	8334	5844
P184	First run contract, Middlesboro, Ky., 9/30/40	8335	5845
P185	First run contract, Lexington, Ky., 9/30/40	8336	5846
P186	Second run contract, Lexington, Ky., 9/30/40	8337	5847
P187	Third run contract, Lexington, Ky., 9/30/40	8338	5848
P188	First run contract, Milford, Del., 9/27/40	8339	5849
P189	Run blank contract, Laurel, Del., 9/27/40	8340	5850
P190	First run contract, Delaware, Ohio, 9/30/40	8341	5851
P192	First run contract, Harlan, Ky., 9/30/40	8342	5852
P193	First run contract, Maysville, Ky., 9/30/40	8343	5853
P194	First run contract, Pikeville, Ky., 9/30/40	8344	5854
P195	Contract, Cumberland, Md., 1/17/41	8345	5855
P196	First run contract, Salisbury, Md., 1/17/41	8346	5856
P197	First run contract, Amsterdam, N. Y., 9/27/40	8347	5857
P198	First run contract, Auburn, N. Y., 9/27/40	8348	5858
P199	Second run contract, Auburn, N. Y., 9/27/40	8349	5859
P200	First run contract, Corning, N. Y., 9/27/40	8350	5860
P201	Second run contract, Corning, N. Y., 9/27/40	8351	5861
P202	First run contract, Cortland, N. Y., 9/27/40	8352	5862
P203	First run contract, Geneva, N. Y., 9/27/40	8353	5863

DIGESTS OF LICENSE CONTRACT EXHIBITS—Continued

		Original	Print
P204	Second run contract, Geneva, N. Y., 9/27/40	8354	5864
P205	First run contract, Glens Falls, N. Y., 9/27/40	8355	5865
P206	First run contract, Gloversville, N. Y., 9/27/40	8356	5866
P207	First run contract, Herkimer, N. Y., 9/27/40	8357	5867
P208	First run contract, Hudson Falls, N. Y., 9/27/40	8358	5868
P209	First run contract, Ilion, N. Y., 9/27/40	8359	5869
P210	First run contract, Little Falls, N. Y., 9/27/40	8360	5870
P211	First run contract, Lockport, N. Y., 9/27/40	8361	5871
P212	Second run contract, Lockport, N. Y., 9/27/40	8362	5872
P213	First run contract, Malone, N. Y., 9/27/40	8363	5873
P214	First run contract, Massena, N. Y., 9/27/40	8364	5874
P215	First run contract, Newark, N. Y., 9/27/40	8365	5875
P216	First run contract, Norwich, N. Y., 9/27/40	8366	5876
P217	First run contract, Ogdensburg, N. Y., 9/27/40	8367	5877
P218	First run contract, Oneonta, N. Y., 9/27/40	8368	5878
P219	First run contract, Penn Yan, N. Y., 9/27/40	8369	5879
P220	First run contract, Seneca Falls, N. Y., 9/27/40	8370	5880
P221	First run contract, Tupper Lake, N. Y., 9/27/40	8371	5881
P222	First run contract, Watertown, N. Y., 9/27/40	8372	5882
P223	Second run contract, Watertown, N. Y., 9/27/40	8373	5883
P224	First run contract, Ashland, Ohio, 9/30/40	8374	5884
P225	First run contract, Athens, Ohio, 9/30/40	8375	5885
P226	First run contract, Bellefontaine, Ohio, 9/30/40	8376	5886
P227	First run contract, Bucyrus, Ohio, 9/30/40	8377	5887
P228	First run contract, Fostoria, Ohio, 9/30/40	8378	5888
P229	First run contract, Kent or Ravenna, Ohio 9/30/40	8379	5889
P230	Repeat run contract, Kent or Ravenna, Ohio, 9/30/40	8380	5890
P231	First run contract, Medina, Ohio, 9/30/40	8381	5891
P232	First run contract, Mount Vernon, Ohio, 9/30/40	8382	5892
P234	First run contract, Norwalk, Ohio, 9/30/40	8383	5893
P235	First run contract, Shelby, Ohio, 9/30/40	8384	5894
P236	First run contract, Tiffin, Ohio, 9/30/40	8385	5895
P237	First run contract, Van Wert, Ohio, 9/30/40	8386	5896
P238	First run contract, Wooster, Ohio, 9/30/40	8387	5897
PP1	Contract, Paramount and Schine, 2/8/40 9/30/40, 1939–40, 1940–41, Piqua, Ohio, first run	8388	5898
PP2	Contract, Paramount and Schine, 2/8/40, 9/27/40, 1939–40, 1940–41, Rochester, N. Y., Cameo, subsequent run	8389	5899
PP3	Contract, Paramount and Schine, 2/8/40, 9/27/40, 1939–40, 1940–41, Rochester, N. Y., Grand subsequent run	8390	5900
PP4	Contract, Paramount and Schine, 2/8/40, 9/27/40, 1939–40, 1940–41, Rochester, N. Y., Liberty, repeat run	8391	5901

DIGESTS OF LICENSE CONTRACT EXHIBITS—Continued

		Original	Print
PP5	Contract, Paramount and Schine, 2/8/40, 9/27/40, 1939–40, 1940–41, Rochester, N. Y., Riviera or Liberty, third run	8392	5902
PP6	Contract, Paramount and Schine, 2/8/40, 9/27/40, 1939–40, 1940–41, Rochester, N. Y., Monroe, After Riviera, etc.	8393	5903
PP7	Contract, Paramount and Schine, 2/8/40, 9/27/40, 1939–40, 1940–41, Rochester, N. Y., Madison, After Riviera, etc.	8394	5904
PP8	Contract, Paramount and Schine, 2/8/40, 9/27/40, 1939–40, 1940–41, Rochester, N. Y., State, Repeat run	8395	5905
PP9	Contract, Paramount and Schine, 2/8/40, 9/27/40, 1939–40, 1940–41, Rochester, N. Y., State, Dixie, third run	8396	5906
PP10	Contract, Paramount and Schine, 2/8/40, 9/27/40, 1939–40, 1940–41, Rochester, N. Y., West End Open with Arnett	8397	5907
F2	Contract, Fox and Schine, 6/17/36, Amsterdam, N. Y., 1936–37—1st	8398	5908
F3	Contract, Fox and Schine, Amsterdam, N. Y., 6/17/36, 1936–37, 2nd run	8399	5909
F4	Contract, Fox and Schine, 8/5/36, 1936–37, Auburn, N. Y., 1st run	8400	5910
F5	Contract, Fox and Schine, 8/5/36, 1936–37, Bath, N. Y., 1st run	8401	5911
F6	Contract, Fox and Schine, 8/5/36, 1936–37, Canandaigua, N. Y., 1st run	8402	5912
F7	Contract, Fox and Schine, 8/5/36, 1936–37, Carthage, N. Y., 1st run	8403	5913
F8	Contract, Fox and Schine, 8/5/36, 1936–37, Corning, N. Y., 1st run	8404	5914
F9	Contract, Fox and Schine, 8/5/36, 1936–37, Corning, N. Y., 2nd run	8405	5915
F10	Contract, Fox and Schine, 8/5/36, 1936–37, Cortland, N. Y., 1st run	8406	5916
F11	Contract, Fox and Schine, 8/5/36, 1936–37, Geneva, N. Y., 1st run	8407	5917
F12	Contract, Fox and Schine, 6/17/36, 1936–37, Glens Falls, N. Y., 1st run	8408	5918
F13	Contract, Fox and Schine, 6/17/36, 1936–37, Glens Falls, N. Y., 2nd run	8409	5919
F14	Contract, Fox and Schine, 6/17/36, 1936–37, Gloversville, N. Y., 1st run	8410	5920
F15	Contract, Fox and Schine, 6/17/36, 1936–37, Gloversville, N. Y., 2nd run	8411	5921
F16	Contract, Fox and Schine, 6/17/36, 1936–37, Hamilton, N. Y., 1st run	8412	5922
F17	Contract, Fox and Schine, 6/17/36, 1936–37, Herkimer, N. Y., 1st run	8413	5923

DIGESTS OF LICENSE CONTRACT EXHIBITS—Continued

		Original	Print
F18	Contract, Fox and Schine, 6/17/36, 1936–37, Hudson Falls, N. Y., 1st run	8414	5924
F19	Contract, Fox and Schine, 6/17/36, 1936–37, Little Falls, N. Y., 1st run	8415	5925
F20	Contract, Fox and Schine, 8/5/36, 1936–37, Lockport, N. Y., 1st run	8416	5926
F21	Contract, Fox and Schine, 8/5/36, 1936–37, Lockport, N. Y., 2nd run	8417	5927
F22	Contract, Fox and Schine, 6/17/36, 1936–37, Malone, N. Y., 1st run	8418	5928
F23	Contract, 20th Century-Schine, 8/17/36, Massena, Massena, N. Y.	8419	5929
F24	Contract, 20th Century-Schine, 8/17/36, Colonial, Norwich, N. Y.	8420	5930
F25	Contract, Fox and Schine, 6/17/36, 1936–37, Ogdensburg, N. Y., 1st run	8421	5931
F26	Contract, Fox and Schine, 6/17/36, 1936–37, Oneonta, N. Y., 1st run	8422	5932
F27	Contract, Fox and Schine, 6/17/36, 1936–37, Oneonta, N. Y., 2nd run	8423	5933
F28	Contract, Fox and Schine, 8/5/36, 1936–37, Perry, N. Y., 1st run	8424	5934
F29	Contract, Fox and Schine, 8/11/37, 1937–38, 1938–39, Perry, N. Y., 1st run	8425	5935
F30	Contract, Fox and Schine, 8/5/36, 1936–37, Rochester, N. Y., State or Dixie, 2nd run	8426	5936
F31	Contract, Fox and Schine, 8/5/36, 1936–37, Rochester, N. Y., State or Dixie, repeat run	8427	5937
F32	Contract, Fox and Schine, 8/5/36, 1936–37, Rochester, N. Y., Lake, sub. run	8428	5938
F33	Contract, Fox and Schine, 8/5/36, 1936–37, Rochester, N. Y., Grand, sub. run	8429	5939
F34	Contract, Fox and Schine, 8/5/36, 1936–37, Rochester, N. Y., Cameo, after Madison and Monroe	8430	5940
F35	Contract, Fox and Schine, 8/5/36, 1936–37, Salamanca, 1st run	8431	5941
F36	Contract, Fox and Schine, 8/5/36, 1936–37, Saranac Lake, 1st run	8432	5942
F37	Contract, Fox and Schine, 8/5/36, 1936–37, Seneca Falls, N. Y., 1st run	8433	5943
F38	Contract, Fox and Schine, 6/17/36, 1936–37, Tupper Lake, N. Y., 1st run	8434	5944
F39	Contract, Fox and Schine, 6/17/36, 1936–37, Watertown, N. Y., 1st run	8435	5945
F40	Contract, Fox and Schine, 10/28/36, 1936–37, Watertown, N. Y., third run	8436	5946
F41	Contract, Fox and Schine, 9/5/36, 1936–37, Ashland, Ohio, 1st run	8437	5947

DIGESTS OF LICENSE CONTRACT EXHIBITS—Continued

		Original	Print
F42	Contract, Fox and Schine, 1936-37; Athens, N. Y., 1st run	8438	5948
F43	Contract, Fox and Schine, 8/5/36, 1936-37, Bellefontaine, O., 1st run	8439	5949
F44	Contract, Fox and Schine, 8/5/36, 1936-37, Bucyrus, O., 1st run	8440	5950
F45	Contract, Fox and Schine, 8/5/36, 1936-37, Delaware, O., 1st run	8441	5951
F46	Contract, Fox and Schine, 8/5/36, 1936-37, Mt. Vernon, O., 1st run	8442	5952
F47	Contract, Fox and Schine, 9/5/36, 1936-37, Norwalk, O., 1st run	8443	5953
F48	Contract, Fox and Schine, 6/17/36, 1936-37, Piqua, O., 1st run	8444	5954
F49	Contract, Fox and Schine, 10/20/37, 1937-38, Lexington, Ky., 2nd run	8445	5955
F50	Contract, Fox and Schine, 12/15/36, 1936-37, Lexington, Ky., 1st run	8446	5956
F51	Contract, Fox and Schine, 12/15/36, 1936-37, Richmond, Ky., 1st run	8447	5957
F52	Contract, Fox and Schine, 4/27/37, 1937-38, Ilion, N. Y., 1st run	8448	5958
F53	Contract, Fox and Schine, 4/27/37, 1938-39, Ilion, N. Y., 1st run	8449	5959
F54	Contract, Fox and Schine, 12/22/37, 1937-38, Kent or Ravenna, 1st run	8450	5960
F55	Contract, Fox and Schine, 12/22/37, 1937-38, Kent or Ravenna, repeat run	8451	5961
F56	Contract, Fox and Schine, 6/14/38, 1937-38, Tiffin, O., 2nd run	8452	5962
F57	Contract, Fox and Schine, 8/5/36, 1936-37, Tiffin, O., 1st run	8453	5963
F59	Contract, Fox and Schine, 8/5/36, 1936-37, Oswego, N. Y., 1st run	8454	5964
F60	Contract, Fox and Schine, 8/5/36, 1936-37, Oswego, N. Y., 2nd run	8455	5965
F61	Contract, Fox and Schine, 8/5/35, 1936-37, Penn Yan, N. Y., 1st run	8456	5966
F62	Contract, Fox and Schine, 8/11/37, 1937-38, and 1938-39, Penn Yan, N. Y., 1st run	8457	5967
F63	Contract, Fox and Schine, 8/5/36, 1936-67, Van Wert, Ohio, 1st run	8458	5968
F64	Contract, Fox and Schine, 8/5/36, 1936-37, Wooster, O., 1st run	8459	5969
F87	Contract, Fox-Schine, 6/20/34, State or Dixie, Rochester, N. Y.	8460	5970
F101(1-40)	Contracts, Fox and Schine, 8/5/35, 1935-36, (80)	8461	5971
F101(42,43)	Contracts (4), Fox and Schine, 8/5/35, 1935-36 (Fox and 20th Century)	8537	6047

DIGESTS OF LICENSE CONTRACT EXHIBITS—Continued

		Original	Print
F117	Contract, Fox and Schine, 12/2/38, 1938-39, Pikeville, Ky., 1st run	8541	6051
F118	Contract, Fox and Schine, 12/3/38, 1938-39, Paris, Ky., second run	8542	6052
F119	Contract, Fox and Schine, 12/2/38, 1938-39, Middlesboro, Ky., 1st run	8543	6053
F120	Contract, Fox and Schine, 12/15/38, 1938-39, Granville, N. Y., 1st run	8544	6054
F121	Contract, Fox and Schine, 12/2/38, 1938-39, Harlan, Ky.	8545	6055
F122	Contracts, Fox and Schine, 12/16/39, 1938/39, 1939/40, 7/24/39, 1940/41, 41/42, Lexington, Ky.	8546	6056
F125	Contract, first run, Maysville, Ky., 1/23/39	8547	6057
F126	Contract, first run, Maysville, Ky., 6/6/39	8548	6058
F127	Contract, first run, Milford, Del., 8/10/39	8549	6059
F128	Contract, first run, Lexington, Ky., 6/6/39	8550	6060
F129	Contract, second run, Lexington, Ky., 6/6/39	8551	6061
F130	Contract, first run, Middlesboro, Ky., 6/6/39	8552	6062
F131	Contract, first run, Paris, Ky., 6/6/39	8553	6063
F132	Contract, first season, Richmond, Ky., 6/6/39	8554	6064
F133	Contract, first run, Cambridge, Md., 8/10/39	8555	6065
F134	Contract, first run, Easton, Md., 8/10/39	8556	6066
F135	Contract, first run, Federalsburg, Md., 8/10/39	8557	6067
F136	Contract, first run, Amsterdam, N. Y., 6/9/39	8558	6068
F137	Contract, second run, Amsterdam, N. Y., 6/9/39	8559	6069
F138	Contract, first run, Auburn, N. Y., 6/7/39	8560	6070
F139	Contract, first run, Bath, N. Y., 6/7/39	8561	6071
F140	Contract, first run, Canandaigua, N. Y., 6/7/39	8562	6072
F141	Contract, first run, Corning, N. Y., 6/7/39	8563	6073
F142	Contract, second run, Corning, N. Y., 6/7/39	8564	6074
F143	Contract, first run, Cortland, N. Y., 6/7/39	8565	6075
F144	Contract, first run, East Rochester or Fairport, N. Y., 2/29/40	8566	6076
F145	Contract, second run, East Rochester or Fairport, N. Y., 2/29/40	8567	6077
F146	Contract, first run, Geneva, N. Y., 6/7/39	8568	6078
F147	Contract, second run, Glens Falls, N. Y., 6/9/39	8569	6079
F148	Contract, first run, Glens Falls, N. Y., 10/8/40	8570	6080
F149	Contract, first run, Gloversville, N. Y., 6/9/39	8571	6081
F150	Contract, second run, Gloversville, N. Y., 6/9/39	8572	6082
F151	Contract, first run, Granville, N. Y., 6/9/39	8573	6083
F152	Contract, first run, Hamilton, N. Y., 6/9/39	8574	6084
F153	Contract, first run, Herkimer, N. Y., 6/9/39	8575	6085
F154	Contract, first run, Hudson Falls, N. Y., 6/9/39	8576	6086
F155	Contract, first run, Ilion, N. Y., 6/9/39	8577	6087

DIGESTS OF LICENSE CONTRACT EXHIBITS—Continued

		Original	Print
F156	Contract, first run, Little Falls, N. Y., 6/9/39	8578	6088
F157	Contract, first run, Glens Falls, N. Y., 6/9/39	8579	6089
F158	Contract, first run, Pikesville, Ky., 6/6/39	8580	6090
F159	Contract, first run, Carthage, N. Y., 6/6/39	8581	6091
F160	Contract, first run, Lockport, N. Y., 6/7/39	8582	6092
F161	Contract, second run, Lockport, N. Y., 6/7/39	8583	6093
F162	Contract, first run, Malone, N. Y., 6/9/39	8584	6094
F163	Contract, first run, Massena, N. Y., 6/9/39	8585	6095
F164	Contract, first run, Norwich, N. Y., 6/9/39	8586	6096
F165	Contract, first run, Ogdensburg, N. Y., 6/9/39	8587	6097
F166	Contract, first run, Oneonta, N. Y., 6/9/39	8588	6098
F167	Contract, second run, Oneonta, N. Y., 6/9/39	8589	6099
F168	Contract, first run, Perry, N. Y., 6/9/39	8590	6100
F169	Contract, subsequent run, Rochester, N. Y., 2/29/40	8591	6101
F170	Contract, subsequent run, Rochester, N. Y., 2/29/40	8592	6102
F171	Contract, subsequent run, Rochester, N. Y., 2/29/40	8593	6103
F172	Contract, subsequent run, Rochester, N. Y., 12/14/39	8594	6104
F173	Contract, second run, Rochester, N. Y., 2/29/40	8595	6105
F174	Contract, repeat run, Rochester, N. Y., 2/29/40	8596	6106
F175	Contract, subsequent run, Rochester, N. Y., 12/14/39	8597	6107
F176	Contract, first run, Salamanca, N. Y., 6/7/39	8598	6108
F177	Contract, first run, Saranac Lake, N. Y., 6/9/39	8599	6109
F178	Contract, first run, Seneca Falls, N. Y., 6/9/39	8600	6110
F179	Contract, subsequent run, Syracuse, N. Y., 9/1/39	8601	6111
F180	Contract, first run, Tupper Lake, N. Y., 6/9/39	8602	6112
F181	Contract, first run, Watertown, N. Y., 6/9/39	8603	6113
F182	Contract, second run, Watertown, N. Y., 6/9/39	8604	6114
F183	Contract, Seven (7) days after first run, Ashland, Ohio	8605	6115
		8606	6116
F184	Contract, first run, Athens, O., 6/6/39	8607	6117
F185	Contract, first run, Bellefontaine, O., 6/8/39	8608	6118
F186	Contract, first run, Bucyrus, O., 6/8/39	8609	6119
F187	Contract, first run, Delaware, O., 6/8/39	8610	6120
F188	Contract, first run, Fostoria, O., 6/8/39	8611	6121
F189	Contract, first run, Kent or Ravenna, O., 6/8/39	8612	6122
F190	Contract, second run, Kent or Ravenna, O., 6/8/39	8613	6123
F191	Contract, first run, Medina, O., 10/10/39	8614	6124
F192	Contract, first run, Mount Vernon, O., 6/8/39	8615	6125
F194	Contract, first run, Norwalk, O., 6/8/39	8616	6126
F195	Contract, first run, Piqua, O., 6/6/39	8617	6127
F196	Contract, first run, Shelby, O., 6/8/39	8618	6128
F197	Contract, first run, Tiffin, O., 6/8/39		

DIGESTS OF LICENSE CONTRACT EXHIBITS—Continued

		Original	Print
F198	Contract, first run, Van Wert, O., 6/8/39	8619	6129
F199	Contract, first run, Wooster, O., 6/8/39	8620	6130
F200	Contract, first run, Cumberland, Md., 3/24/41	8621	6131
F201	Contract, first run, Ballston, N. Y., 9/17/40	8622	6132
F202	Contract, first run, Mechanicville, N. Y., 9/17/40	8623	6133
F203	Contract, first run, Whitehall, N. Y., 9/17/40	8624	6134
F204	Contract, subsequent run, Rochester, N. Y., 12/14/39	8625	6135
F205	Contract, first run, Newark, N. Y., 6/7/39	8625	6136
F206	Contract, first run, Oswego, N. Y., 6/7/39	8627	6137
F207	Contract, second run, Oswego, N. Y., 6/7/39	8628	6138
F208	Contract, first run, Penn Yan, N. Y., 6/7/39	8629	6139
F209	Contract, first run, Harlan, Ky., 6/6/39	8630	6140
F210	Contract, first run, Hurlock, Md., 1/6/41	8631	6141
F211	Contract, first run, Hurlock, Md., 11/30/39	8632	6142
F212	Contract, first run, Saint Michaels, Md., 1/6/41	8633	6143
D213	Contract, first run, Saint Michaels, Md., 11/30/39	8634	6144
F214	Contract, first run, Laurel, Del., 6/22/39	8635	6145
D42	Contract, RKO and Kemper, 3/23/39, 1938–39	8636	6146
D47	Contract, Columbia and Reliance, Palace	8637	6147
D48	Contract, Columbia and Reliance, Palace	8638	6148
D49	Contract, Columbia and Reliance, Palace	8639	6149
D69	Contract, 1/27/34, U.A. & Reliance, Arrowsmith, 1st run	8640	6150
D70	Contract, 1/27/34, U.A. & Reliance, Scarface, 1st run	8642	6152
D71	Contract, U.A. & Reliance, Tonight or Never, 1st run, 1/27/34	8643	6153
D72	Contract, U.A. & Reliance, Cock of the Air, 1st run, 1/27/34	8644	6154
D73	Contract, U.A. & Reliance, Bitter Sweet, 1st run, 1/27/34	8646	6156
D74	Contract, U.A. & Reliance, Unholy Garden, 1st run, 1/27/34	8647	6157
D75	Contract, U.A. & Reliance, Secrets, 1st run, 2/16/34	8649	6159
D76	Contract, U.A. & Reliance, Emperor Jones, 1st run, 2/16/34	8650	6160
D77	Contract, U.A. & Reliance, Private Life Henry 8th, 1st run, 2/10/34	8651	6161
D78	Contract, U. A. & Reliance, Catherine The Great, 1st run, 5/7/34	8652	6162
D79	Contract, U. A. & Reliance, Greeks Had A Word, 1st run, 2/26/34	8653	6163
D80	Contract, U. A. & Reliance, Sorrell and Son, 1st run, 6/9/34	8655	6165
D81	Contract, U. A. & Reliance, Born To Be Bad, 1st run, 7/28/34	8656	6166

DIGESTS OF LICENSE CONTRACT EXHIBITS—Continued

		Original	Print
D82	Contract, Mundus Distributing Company, 12/15/34	8658	6168
D83	Contract Mundus Distributing Company, 3/20/35	8659	6169
D84	Contract, U. A. & Reliance, Congo Raid, 4/22/35	8660	6170
D85	Contract, U. A. & Reliance, Private Life Don Juan, 1st run, 4/22/35	8661	6171
D86	Contract, U. A. & Reliance, Runaway Queen, 1st run, 4/22/35	8662	6172
D87	Contract, U. A. & Reliance, Our Daily Bread, 1st run, 4/22/35	8663	6173
D88	Contract, U. A. & Reliance, Transatlantic Merry Go Round, 1st run, 4/ /35	8664	6174
D89	Contract, U. A. & Reliance, Clive of India, 1st run, 4/22/35	8665	6175
D90	Contract, U. A. & Reliance, Folies Bergere, 1st run, 4/22/35	8666	6176
D91	Contract, U. A. & Reliance, Bulldog Drummond, 1st run, 4/22/35	8667	6177
D92	Contract, U. A. & Reliance, Cellini, 1st run, 4/22/35	8668	6178
D93	Contract, U. A. & Reliance, Brewsters Millions, 1st run, 5/14/35	8669	6179
D94	Contract, U. A. & Reliance, Cardinal Richelieu, 1st run, 5/14/35	8670	6180
D95	Contract, U. A. & Reliance, Les Miserables, 1st run, 5/14/35	8671	6181
D96	Contract, U. A. & Reliance, Scarlet Pimpernel, 1st run, 4/22/35	8672	6182
D97	Contract, U. A. & Reliance, Thunder in The East, 1st run, 5/11/35	8673	6183
D98	Contract, U. A. & Reliance, Rain, 1st run, 4/5/34	8674	6184
D99	Contract, U. A. & Reliance, Let Have It, 1st run, 5/11/35	8675	6185
D100	Contract, U. A. & Reliance, Escape Me Never, 1st run, 10/23/35	8676	6186
D101	Contract, U. A. & Reliance, Nell Gwyn, 1st run, 10/23/35	8677	6187
D102	Contract, U. A. & Reliance, Amateur Lady, 1st run, 5/11/35	8678	6188
D103	Contract, U. A. & Reliance, Red Salute, 1st run, 12/27/35	8679	6189
D104	Contract, U. A. & Reliance, Melody Lingers On, 1st run, 5/11/35	8680	6190
D105	Contract, U. A. & Reliance, 2 Kordas, 1st run, 9/21/36	8681	6191
D106	Contract, U. A. & Reliance, Amateur Gentlemen, 1st run, 9/28/36	8682	6192

DIGESTS OF LICENSE CONTRACT EXHIBITS—Continued

		Original	Print
D107	Contract, U. A. & Reliance, Street Scene, 1st run, 4/5/34	8683	6193
D110	Contract, Paramount and Reliance, 3 features, 1st run, 7/27/34	8684	6194
D111	Contract, Paramount and Reliance, 5 features, 4/23/34	8685	6195
D117	Contract, RKO & Wallace, 10/7/41	8686	6196
D118	Contract, RKO & Wallace, 10/7/41	8687	6197
D123	Contract, Columbia and Wallace, 1934–35, Capitol, Auburn	8688	6198
D124	Contract, Columbia and Wallace, 1935–36, Capitol, Auburn	8689	6199
D125	Contract, Columbia and Wallace, 1937–38, Capitol	8690	6200
D126	Contract, Columbia and Wallace, 1938–39, Capitol	8691	6201
D127	Contract, Columbia and Wallace, 1939–40, Capitol	8692	6202
D128	Contract, Columbia and Wallace, 1936–37, Capitol	8693	6203
D129	Contracts (2), Columbia and Wallace, 1940/41, 41/42, Capitol	8694	6204
D140	Contract, RKO and Smalley, 9/7/37, 1937–38, features for Norwich	8698	6208
D141	Contract, Columbia and Smalley, 8/12/35	8699	6209
D142	Contract, Columbia and Smalley, 5/6/37	8700	6210
D147	Contract, Columbia and Smalley, 12/20/40	8701	6211
D148A	Contract, Warner and State-Bucyrus, 7/13/35	8702	6212
D148D	Contract, Warners—First National and State—Bucyrus, 9/5/35	8703	6213

[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

Civil Action No. 223

UNITED STATES OF AMERICA, Plaintiff,

v.

SCHINE CHAIN THEATRES, INC., SCHINE CIRCUIT, INC., Schine Theatrical Co., Inc., Schine Enterprises Corporation, Schine Chain Theatres of Ohio, Inc., Schine Lexington Corporation, Chesapeake Theatres Corporation, J. Meyer Schine, Louis W. Schine, John A. May, Loew's Incorporated, Radio-Keith-Orpheum Corporation, Universal Pictures Company, Inc., Universal Film Exchanges, Inc., Twentieth Century-Fox Film Corporation, United Artists Corporation, Columbia Pictures Corporation, Warner Bros. Pictures, Inc., Vitagraph, Inc., Paramount Pictures, Inc., and Paramount Film Distributing Corporation, Defendants

COMPLAINT

To the Honorable, the Judges of the District Court of the United States for the Western District of New York.

I. JURISDICTION AND VENUE

1

The United States of America, by George L. Grobe, United States Attorney for the Western District of New [fol. 2] York, acting under the direction of the Attorney General, brings this proceeding under Section 4 of the Act of Congress of July 2, 1890, 26 Stat. 209, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," said Act being commonly known as the Sherman Anti-Trust Act, against the above named defendants in order to prevent violations by them, jointly and severally, as hereinafter alleged, of Sections 1 and 2 of said Act.

2

The alleged unlawful acts and violations hereinafter described, including the unlawful monopoly, attempts to monopolize, combinations and conspiracies to monopolize, and contracts, combinations and conspiracies to restrain trade and commerce among the several States of the United States and with foreign countries, have been and are conceived, carried out and made effective, in part, within the Western District of New York, and many of the unlawful acts done in pursuance thereof have been performed by the defendants, or some of them, and their respective representatives, within said District. The interstate trade and commerce involved in the motion picture industry, as hereinafter described, is carried on, in part, within the said District.

II. Description of Defendants

3

Schine Chain Theatres, Inc., is a corporation organized and existing under the laws of the State of New York and has its principal place of business in Gloversville, New York.

4

Schine Circuit, Inc., is a corporation organized and existing under the laws of the State of New York and has its principal place of business in Gloversville, New York.

[fol. 3]

5

Schine Theatrical Co., Inc., is a corporation organized and existing under the laws of the State of New York and has its principal place of business in Gloversville, New York.

6

Schine Enterprises Corporation is a corporation organized and existing under the laws of the State of New York and has its principal place of business at 1250 Sixth Avenue, New York, New York.

7

Schine Chain Theatres of Ohio, Inc., is a corporation organized and existing under the laws of the State of Delaware with David M. Donley, Union Commerce Building, Cleveland, Ohio, as agent.

8

Schine Lexington Corporation is a corporation organized and existing under the laws of the State of New York and has its principal place of business in Gloversville, New York.

9

Chesapeake Theatres Corporation is a corporation organized and existing under the laws of the State of Maryland and has its principal place of business in Gloversville, New York.

10

J. Meyer Schine is a resident of Gloversville, New York.

11

Louis W. Schine is a resident of Gloversville, New York.

[fol. 4]

12

John A. May is a resident of Gloversville, New York.

13

The defendants named and described above in paragraph 3 to 12, inclusive, are sometimes hereinafter collectively referred to as the "Schine defendants."

14

Loew's Incorporated, hereinafter referred to as Loew's is a corporation organized and existing under the laws of the State of New York, and has its principal place of business at 1540 Broadway, in the City of New York, New York.

15

Radio-Keith-Orpheum Corporation, hereinafter referred to as RKO, is a corporation organized and existing under the laws of the State of Maryland, and has its principal place of business at 1270 Sixth Avenue, in the City of New York, New York.

16

(a) Universal Pictures Company, Inc., hereinafter referred to as Universal, is a corporation organized and existing under the laws of the State of Delaware, and has its

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 258

ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, JR., JAMES M. SCHWABACHER, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

FILED AUGUST 12, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, JR., JAMES M. SCHWABACHER, ET AL., APPELLANTS,

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

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[fol. 1] [Caption omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 713

ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, JR., James H. Schwabacher, May K. Schwabacher, Ethel S. Sokolow, and John L. Schwabacher, Plaintiffs,

vs.

UNITED STATES OF AMERICA, and THE INTERSTATE COMMERCE COMMISSION, Defendants

COMPLAINT—Filed May 29, 1947

The plaintiffs respectfully state to the Court and allege:

I

This action arises under the provisions of the Interstate Commerce Act, as amended, (Sections 5 (2) and 20 (a)) and [fol. 2] Sections 24, 208, and 209 of the Judicial Code (U. S. C. Title 28, Sections 41, 45, and 46) and has for its purpose the enjoining, suspending and setting aside of a Decision and Order of the Interstate Commerce Commission entitled "Finance Docket No. 15228, Pere Marquette Railway Company Merger, Etc.," dated April 1, 1947, as hereinafter more fully appears, and hence is within the jurisdiction confided to this Court by the laws hereinabove referred to. The Decision and Order referred to above are attached hereto as Exhibit 1-A.

II

1. Plaintiffs, Albert E. Schwabacher, Albert E. Schwabacher, Jr., James H. Schwabacher, May K. Schwabacher, Ethel S. Sokolow, John L. Schwabacher and Albert E. Schwabacher and May K. Schwabacher (as trustees under the Joseph Koshland Trusts) are the owners of 2100 shares of 5% Cumulative Preferred stock of Pere Marquette Railway Company.

2. On March 8, 1946, the Chesapeake & Ohio Railway Company, the Pere Marquette Railway Company and the

Alleghany Corporation applied to the Interstate Commerce Commission for authorization and approval of a merger agreement under the terms of the Interstate Commerce Act, as amended, and specifically to take the following action:

(a) Under section 5(2) of said Act, for merger of the properties and franchises of the Pere Marquette into the Chesapeake & Ohio for ownership, management, and operation;

(b) Under section 312 of said Act, for transfer to the Chesapeake & Ohio of the certificate authorizing operation by the Pere Marquette as a common carrrier by water;

(c) Under section 20a of said Act, for issuance by the Chesapeake & Ohio of certain securities, and assumption by it of obligation and liability in respect of securities of the Pere Marquette and of the Toledo Terminal Railroad Company, a Pere Marquette affiliate, in connection with the proposed merger; and

(d) Under section 5(2) of said Act, for acquisition by the Alleghany of control, through the Chesapeake & Ohio, of the properties and franchises of the Pere Marquette, and of the Pere Marquette's interests in subsidiary of affiliated carriers and in leaseholds, contract rights to operate, and trackage rights over or joint use of the railroad lines of such companies and of certain other carriers.

[fol. 3] 3. Believing the proposed merger agreement unfair to the holders of Pere Marquette preferred stock and lacking in provisions otherwise to protect their interests, plaintiffs have refused to become a party to the proposed agreement of merger. Plaintiffs also have intervened in the proceeding before the Interstate Commerce Commission on the proposed application of merger and has taken the position that the proposed agreement is unfair to the Cumulative Preferred shareholders as well as dissenting shareholders from the proposed plan and that the Commission has a legal obligation to protect their rights in approving the proposed application.

4. On or about November 16, 1946, the Proposed Report of the Bureau of Finance, Interstate Commerce Commis-

sion, was issued tentatively approving the application of merger. In this Report the rights of dissenting shareholders were ignored and no conditions were attached to the approval requiring the applicants to protect the rights of plaintiffs or others in the same position. To this Proposed Report, plaintiffs filed exceptions upon intervention pointing out that the rights of dissenting shareholders were no where given protection either by the applicants or the Commission.

5. On or about April 1, 1947, the Commission, through its Division 4, issued its final Order approving the plan of merger as substantially set forth in its earlier Report. Plaintiffs filed a Motion for rehearing before the full Commission on May 1, 1947. The effective date of the Order of Division 4 was postponed by the Commission until it could pass upon plaintiffs' Motion. (Exhibit 1-B). On May 20, 1947, the Commission denied plaintiffs' Motion for rehearing with a stipulation that its Decision and Order would become effective 15 days thereafter. (Exhibit 1-C).

6. Section 5(2)(b) of the Interstate Commerce Act, as amended, vests the Interstate Commerce Commission with authority to impose terms and conditions with respect to unifications, mergers and acquisitions of control of transportation carriers in order to insure "just and reasonable" terms to all concerned. Failure to include protection for plaintiffs as dissenting shareholders, as a distinct class cre- [fol. 4] ated by the merger, is contrary to law and a direct violation of the Commission's statutory duty to impose just and reasonable conditions for the protection of all interests concerned. In this regard the Commission has departed from its past practice of requiring that merger agreements contain either provisions for the protection of dissenting shareholders or conditions to approval for a similar purpose. In the instant case, the Decision and Order of the Commission offers no affirmative protection but instead relegates plaintiffs as dissenting shareholders to "negotiation and litigation in the courts". (Exhibit 1-A, page 41). Such action is wholly without warrant of law.

7. Plaintiffs have suffered and will continue to suffer substantial and irreparable damage by virtue of the Commission's failure to recognize and protect their rights under the Interstate Commerce Act, as amended. The Commis-

sion contends that its authority under the Act to approve mergers, unifications and acquisition of control is plenary, primary and exclusive. Nevertheless, it refuses to require applicants to offer plaintiffs any protection and fails itself to condition its approval of the merger agreement upon a protection of such rights. In this situation plaintiffs are without remedy unless this Court will require the Commission to perform its duties under the statute.

III

Unless this Court shall by temporary stay or suspension of the Order of the Commission enjoin or restrain the enforcement of such order pending the final determination of this action, plaintiffs will suffer irreparable damage through the unlawful action of the Commission and will lose the remedy provided under the Interstate Commerce Act, as amended. On May 23, 1947, plaintiffs requested the Commission to stay the effective date of its order until an appeal could be perfected to this Court to determine the legality of its action. (Exhibit 2). On May 28, 1947, the Commission denied this request for a stay of its order. Unless this Court enjoins or suspends the Order of the Commission, the applicants will proceed to consummate the merger at the earliest available time and the rights of the plaintiff [fols. 5-6] will be lost through the inability of the Commission to revoke or recall its present approval. There can be no doubt of this intention on the part of the applicants. In their letter of May 27, 1947, to the Commission opposing plaintiffs' request for a stay, counsel for the applicants state:

> "Should there be no further postponement of the effective date of the Order approving the merger, applicants have planned to consummate the merger not later than June 5, 1947." (See Exhibit 3).

Once the merger agreement has been consummated, this Court will be powerless to correct the unlawful and arbitrary action on the part of the Commission in denying protection to the rights of plaintiffs.

Wherefore, plaintiffs pray as follows:

(1) That notice and summons be issued herein to the defendants and served upon the United States of America

and the Interstate Commerce Commission as required by law.

(2) That this Court issue and enter a temporary stay or suspension of the Decision and Order of the Commission, dated April 1, 1947, pending final determination of this action.

(3) That said Decision and Order be annulled and its enforcement prohibited and enjoined.

(4) Such other relief in the premises as may be necessary to protect plaintiffs as dissenting shareholders of the Pere Marquette Railway Company.

(Sgd.) Oscar L. Shewmake, 1203 State-Planters Bank Bldg., Richmond 19, Virginia; (Sgd.) Robert M. Cooper, 1302 Eighteenth St., N. W., Washington 6, D. C.

Duly sworn to by Oscar L. Shewmake. Jurat omitted in printing.

[fol. 7] EXHIBIT 1-A TO COMPLAINT—Filed June 4, 1947

Interstate Commerce Commission

Finance Docket No. 15228[1]

Pere Marquette Railway Company Merger, Etc.

Submitted January 10, 1947. Decided April 1, 1947

Subject to conditions prescribed:

1. Merger of the properties and franchises of the Pere Marquette Railway Company into the Chesapeake & Ohio Railway Company for ownership, management, and operation, approved and authorized.

2. Authority granted to the Chesapeake & Ohio Railway Company (a) to issue not exceeding $21,142,940 of 3½ per cent convertible preferred stock, consisting of 211,429.4 shares of the par value of $100 each, and $7,806,805 of common stock, consisting of 312,272.2 shares of the par

---

[1] Also for the purpose of giving effect to the determinations here, No. W-887, Pere Marquette Railway Company Common Carrier Application.

value of $25 each, in conversion of all the outstanding capital stock of the Pere Marquette Railway Company; (b) to sell at not less than current market prices, but at not less than par, all shares of the capital stock issuable in conversion of the shares of stock of the Pere Marquette Railway Company held by the Chesapeake & Ohio Railway Company on the merger date, the proceeds to be used only for capital expenditures; (c) to issue from time to time not exceeding $8,457,176 of additional common stock, consisting of 338,287.04 shares of the par value of $25 each; in conversion of the 211,429.4 shares of 3½-per cent convertible preferred stock; (d) to issue to holders of certificates for common stock of the Chesapeake & Ohio Railway Company outstanding on the merger date, on a share-for-share basis, new certificates of its common stock bearing the provisions of article VI of the merger agreement; (e) to issue in temporary form certificates for shares of stock in respect of which authority is hereby granted, to be exchangeable for definitive certificates; (f) to issue, in lieu of certificates for fractional shares resulting from the conversion of stocks of the Pere Marquette Railway Company into stock of the Chesapeake & Ohio Railway Company and from the conversion of the latter's 3½-per cent convertible preferred stock into its common stock, scrip certificates in bearer form, exchangeable for full shares represented by such certificates within the periods set forth herein; (g) to issue from time to time certificates for full shares of 3½-per cent convertible preferred stock and common stock in exchange for scrip certificates representing such shares; (h) to sell at not less than current market prices, but at not less than par, all shares of its capital stock which, or the rights to which, have been forfeited to it by stockholders dissenting from the merger, the proceeds to be used only for capital expenditures; (i) to assume obligation and liability, as primary obligor, in respect of the payment of the principal of and the interest or dividends on the aggregate amount of indebtedness of the Pere Marquette Railway Company of the nature described herein outstanding on the date of the merger; and (j) to assume obligation and liability, as guarantor, severally with other proprietary companies of the [fol. 8] Toledo Terminal Railroad Company, in respect of the payment of a portion of the interest on $5,800,000 of that company's first mortgage 4½-per cent bonds; all in connection with the proposed merger.

3. Acquisition by the Chesapeake & Ohio Railway Company and, through that company, by the Alleghany Corporation; through merger, of ownership of the vessels of the Pere Marquette Railway Company, authorized under the *Panama Canal Act*. Cf. 34 I.C.C. 86.

4. Transfer to the Chesapeake & Ohio Railway Company of the certificate dated February 23, 1944, issued to the Pere Marquette Railway Company in Docket No. W-887, approved.

5. Acquisition by the Alleghany Corporation, through the Chesapeake & Ohio Railway Company, of control of the properties and franchises of the Pere Marquette Railway Company, and of its interests in subsidiary or affiliated companies and in leases, operating contracts, and trackage agreements relating to operation over or joint use of the railroad lines of such companies and of certain other carriers, approved and authorized.

R. W. Purcell, J. C. Kauffman, John C. Shields, George H. Gardner, R. F. Maskey, and *Glenn C. Wilber* for applicants.

C. M. Mulholland, Emmet J. Brennan, A. G. Berse, Samuel W. Savage, Carl McFarland, S. J. Angland, T. W. Dahlquist, Chas. L. Barnard, Jacob Shapiro, and *Donald D. Wilson* for intervenors.

Report of the Commission

Division 4, Commissioners Mahaffie, Miller and Rogers

By Division 4:

Exceptions to the report proposed by the Bureau of Finance were filed, and the case has been argued orally.

The Chesapeake and Ohio Railway Company, the Pere Marquette Railway Company, and the Alleghany Corporation[2] applied March 8, 1946, for authorization and approval under the Interstate Commerce Act, as amended, as follows:

[2] The Chesapeake & Ohio is a carrier by railroad subject to part I of the act, the Pere Marquette is a carrier by railroad subject to part I and a common carrier by water subject to part III, and the Alleghany is a company which has control of several carriers and is subject to section 20 (1-10) and section 20a (2-11) of the act. See *Chesapeake & O. Ry. Co. Purchase*, 261 I.C.C. 239, 262.

(1) Under section 5(2), for merger of the properties and franchises of the Pere Marquette into the Chesapeake & Ohio for ownership, management, and operation;

(2) Under section 312, for transfer to the Chesapeake & Ohio of the certificate authorizing operation by the Pere Marquette as a common carrier by water;

(3) Under section 20a, for issue by the Chesapeake & Ohio of certain securities, and assumption by it of obligation and liability in respect of securities of the Pere Marquette, and of the Toledo Terminal Railroad Company, a Pere Marquette affiliate, in connection with the proposed merger; and

(4) Under section 5(2), for acquisition by the Alleghany of control, through the Chesapeake & Ohio, of the properties [fol. 9] and franchises of the Pere Marquette, and of the Pere Marquette's interests in subsidiary or affiliated carriers and in leaseholds, contract rights to operate, and trackage rights over or joint use of the railroad lines of such companies and of certain other carriers.

The applicants also ask for such further authority under any other provisions of the act, or of any other law, as we may deem necessary or proper in the premises.

More specifically, in (3) the Chesapeake & Ohio applied for authority (a) to issue 211,429.4 shares of 3½-percent convertible preferred stock of the par value of $100 each, and 312,272.2 shares of common stock of the par value of $25 each; (b) to sell the shares of stock issuable in conversion of the shares of stock of the Pere Marquette held by the Chesapeake & Ohio on the merger date; (c) to issue from time to time 338,287.04 additional shares of common stock of the par value of $25 each in conversion of the 211,429.4 shares of 3½-percent convertible preferred stock; (d) to issue to holders of certificates for its common stock outstanding on the merger date, on a share-for-share basis, new certificates of its common stock bearing on their reverse side the provisions of article VI of the merger agreement; (e) to issue in temporary form certificates for shares of stock in respect of which authority is requested, to be exchangeable for definitive certificates; (f) to issue, in lieu of certificates for fractional shares resulting from the exchange of Pere Marquette stocks for stock of Chesapeake & Ohio and from the conversion of the latter's 3½-percent convertible preferred stock into its common stock, scrip

certificates in bearer form, exchangeable for full shares represented by such certificates within the periods set forth herein after; (g) to issue certificates for full shares of 3½-percent convertible preferred stock and common stock in exchange for scrip certificates representing such shares; (h) to sell for such considerations as may be fixed by its board of directors all shares of its capital stock which, or the right to which, has been forfeited to it by stockholders dissenting from the merger; (i) to assume obligation and liability, as primary obligor, in respect of the payment of the principal of and the interest or dividends on all of the indebtedness of the Pere Marquette outstanding on the merger date; and (j) to assume obligation and liability, as guarantor, severally with other proprietary companies of the Toledo Terminal Railroad Company, in respect of the payment of a portion of the interest on $5,800,000 of that company's first-mortgage 4½-percent bonds.

A hearing was held. No representations have been made by State authorities. The Railway Labor Executives' Association and certain Pere Marquette stockholders intervened, some after the hearing and service of the proposed report.

Intercorporate Relationships

The Chesapeake & Ohio now controls the Pere Marquette through ownership of 313,900 shares, or 69.69 percent, of its common stock, and 13,950 shares, or 11.22 percent, of its preferred; total 327,850 shares, or 47.74 percent, of the stock of all classes.[3] The Chesapeake & Ohio also controls the New York, Chicago & St. Louis Railroad Company, commonly known as the Nickel Plate, through ownership of 192,400 shares or 57.01 percent, of that carrier's common stock; and through the Nickel Plate, has control of the Wheeling & Lake Erie Railway Company. The Alleghany controls the Chesapeake & Ohio through ownership of the beneficial interest in 606,634 shares, or 7.92 percent, of its

[3] Western Pocahontas Corporation, a wholly owned subsidiary of the Chesapeake & Ohio, owns 6,000 shares of Pere Marquette preferred in addition to the stock owned by the parent company. Thus, the Chesapeake & Ohio, as the real party in interest, has the voting power of a total of 333,850 shares, or 48.61 percent, of all the stock.

[fol. 10] common stock[4]; and, through the Chesapeake & Ohio, controls the Pere Marquette, the Nickel Plate, and the subsidiaries and affiliates of those carriers, *Chesapeake & O. Ry. Purchase, supra.*

The (1) Alleghany, (2) Chesapeake & Ohio, and (3) Pere Marquette have directors and senior officers in common, as follows:

	(1)	(2)	(3)
R. R. Young	OD	OD	
A. P. Kirby	OD	D	
R. W. Purcell	OD	OD	O
J. J. Anzalone	OD	O	
R. J. Bowman		OD	OD
H. B. Erminger, Jr.		D	D
R. S. Marshall		O	OD
W. C. Hull		O	O
E. M. Thomas		O	O
W. H. Wenneman		O	O
H. F. Lohmeyer		O	O
C. M. Hepler		O	O
H. E. Walker		O	O
J. C. Kauffman		O	O

(Symbols: O, officer; D, director; OD, officer and director.)

Young is chairman of the Board of the Alleghany and of the Chesapeake & Ohio. Together with Kirby, he acquired control of the Alleghany in 1937 and, at all times since that date, has been prominent in the management of the corporation's affairs. The Chesapeake & Ohio and the Pere Marquette have a common president, and common accounting, purchasing, and engineering research departments, and common officers head their law and traffic departments.

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[4] Pledged as follows: 600,000 shares, with the Chase National Bank as part of the security for a loan of $15,000,000, maturing July 3, 1953; and 6,634 shares, with the Manufacturers Trust Company as part security for a loan of $9,000,000, maturing June 1, 1949. (Since the date of the application, the Alleghany's holding of Chesapeake & Ohio common has been reduced in the net amount of 85,400 shares, so that it presently owns 521,234 shares, or 6.81 percent, of this stock.)

Chesapeake & Ohio System

Parent company.—The Chesapeake & Ohio was incorporated in Virginia in 1878, and is now subject to the general laws of that State. Before the turn of the century its system extended from Washington, D. C., and Newport News, Va., on the east, to Louisville, Ky., and Cincinnati, Ohio, on the west. By 1920, however, it had made definite arrangements to extend its lines to Chicago, Ill., through organization of the Chesapeake & Ohio Railway Company of Indiana (1910); and to Toledo, Ohio, on Lake Erie, through acquisition of control of the Hocking Valley Railway Company (1909) and construction of the Chesapeake & Ohio Northern Railway (1917).

Expansion of system.—With the Commission's authorization and approval, the Chesapeake & Ohio acquired control (1) of the Pere Marquette in 1929, *Control of Erie R. R. and Pere Marquette Ry.*, 138 I.C.C. 517 and 150 I.C.C. 751; (2) control of the Nickel Plate in 1938, *New York, C. & St. L. R. Co. and Erie R. Co. Control*, 224 I.C.C. 259; and (3) inchoate control of the Wheeling & Lake Erie, jointly with [fol. 11] the Nickel Plate, in 1941, Wheeling & L. E. Ry. Co. Control, 249 I.C.C. 490. The progress heretofore made in unification within the system is summarized in the report cited in (2), pages 261-2.

Present operated mileage.—The Chesapeake & Ohio now owns and operates 1,496.9 miles of main lines and 1,220.01 miles of branches, total 2,716.91 miles. Including lines used under trackage rights, it operates a total of 3,084.15 miles of railroad. In general, its railroads extend from the bituminous coal fields of southern West Virginia, eastern Kentucky, and southern Ohio, eastward to tidewater at Hampton Roads, and north and west to the Great Lakes at Toledo and Chicago.

Business.—This company has been engaged in transportation by railroad continuously for nearly 70 years. It is predominantly a carrier of coal. In 1945, coal comprised 77 percent of its total tonnage. Its line originates more bituminous coal than any other railroad in the country; and commercially mineable coal in territory tributary to its lines is estimated to be sufficient to provide continued production, at the average 1935-44 annual rate, for 100 years.

Pere Marquette System

Early history.—A considerable part of the Pere Marquette system was built piecemeal to serve the lumbering industry of Michigan. Construction was begun in 1857, and more than 50 companies actively engaged in building lines which, following many consolidations and various reorganizations, including 7 receivership proceedings, finally were unified in single ownership.

Present parent company.—The Pere Marquette was incorporated in 1917, under the laws of Michigan, as the successor of the Pere Marquette Railroad Company, which had been in receivership since 1912. In this reorganization the debt of the old company was scaled down, but little change in aggregate capitalization was effected because of a corresponding increase in capital stock.

Subsidiaries and affiliates.—The parent company owns interests in the stocks of other carrier corporations, as follows: Flint Belt Railroad Company, 10,000 shares, or 100 percent; Manistee & Northeastern Railway Company, 8,537 shares, 100 percent; Lake Erie & Detroit River Railway Company, 14,000 shares, 100 per cent; Fort Street Union Depot Company, 6,765 shares, 67.65 percent; Toledo Terminal Railroad Company, 6,448 shares, 16.12 percent; Belt Railway Company of Chicago, 2,400 shares, 7.69 percent; Fruit Growers Express Company, 1,002 shares, 1.20 percent; and Railway Express Agency, Inc., 7 shares, .7 percent. It also owns interest in various non-carrier corporations.

The Flint Belt Railroad Company provides a by-pass for freight trains around the congested section of Flint, Mich. The Manistee & Northeastern operates in western Michigan northward from Manistee to Northport on Grand Traverse Bay. The Lake Erie & Detroit River owns lines in Ontario from Walkerville to St. Thomas, 127.16 miles, and from Sarnia to Erieau, 71.62 miles, that constitute a part of the Pere Marquette's Canadian Division and are used by it under a lease dated September 1, 1944. It also uses under lease a line from Ferrysburg to Grand Haven, Mich., .05 mile, owned by the Grand Trunk Western Railroad Company. The Pere Marquette has joint use of lines of other companies, including subsidiaries or affiliates, aggregating 244.27 miles.

Existing system.—In general, the Pere Marquette's system extends from Chicago, through Grand Rapids and

Detroit, Mich., to Buffalo, N. Y.; from Toledo, through Flint and Saginaw, to Ludington, Mich., on the east shore of Lake Michigan; and from Grand Rapids to Petoskey, Mich. The company owns 1,269.1 miles of main lines and 236.56 miles of branches, total, 1,505.66 miles; and operates a total of 1,948.76 miles of railroad. In addition, it operates car ferries across Lake Michigan between Ludington and Milwaukee, Wis., between Ludington and Manitowoc, Wis., and between Ludington and Kewaunee, Wis., a total of 225 route miles, and across the Detroit River between Detroit and Windsor, Ont., a distance of approximately 1 mile. [fol. 12]

Traffic.—The Pere Marquette serves generally the coal-consuming industrial area of the lower peninsula of Michigan, including Detroit, Grand Rapids, Lansing, Flint, Muskegon, Saginaw, Midland, and Bay City, to which it has access from Chicago, Toledo, and Buffalo. By means of its Lake Michigan ferries it effects, at or through the Wisconsin ports, connections with railroads serving the Northwest.

Manufactures and miscellaneous freight comprise about 45 percent of the Pere Marquette's tonnage, and coal and coke comprise about 38 percent. Together these commodities constitute about 83 percent of its total business.

Other Affiliated Lines

The Nickel Plate's lines extend westward from Buffalo to Chicago, Peoria, Ill., Indianapolis, Ind., and St. Louis, Mo. The Wheeling & Lake Erie has lines, all in Ohio, which cross at Harmon and extend thence northwest to Toledo, northeast to Cleveland, southeast to the Ohio River at a point opposite Wheeling, W. Va., and southwest to Zanesville, with subsidiary lines to Huron and to Lorain, on Lake Erie.

Unification for Management

Physical relationships.—The Chesapeake & Ohio and Pere Marquette systems connect for interchange of traffic at Toledo, at LaCrosse, Ind., and at Chicago.

Affiliation.—In 1927, when the Chesapeake & Ohio presented its first proposal to acquire control of the Pere Marquette, the Chesapeake & Ohio and the Nickel Plate were controlled by the Van Sweringen interests, and the Nickel Plate controlled the Pere Marquette, *Control of Erie R.R., etc.* 138 I.C.C. 517. The Commission there authorized the Chesapeake & Ohio to purchase from the Virginia Trans-

portation Company 1,900 shares of Pere Marquette common stock, 12,600 shares of preferred, and 2,100 shares of prior preference; to acquire 36,500 shares of the common from the Vaness Company at the cost thereof to that concern, $2,522,881, or $69.12 a share; and to acquire such other shares of the common, as might be obtainable at not exceeding $110 a share, or such preferred or prior preference stock as might be obtainable at not more than $100 a share.

In July 1928, the Chesapeake & Ohio asked the Commission to modify this determination so as to permit the purchase of 174,900 shares of Pere Marquette common from the Nickel Plate at $133.33 a share plus accrued dividends, in addition to the shares held by the Virginia Transportation Company and by the Vaness Company. The Chesapeake & Ohio was authorized to acquire the 174,900 shares of common from the Nickel Plate and to acquire, at the same price, such additional shares of common as might be necessary to constitute a numerical majority of the Pere Marquette's outstanding stock, with the reservation that this determination was not to be construed in any respect as a precedent for subsequent determination of the reasonableness of the terms, conditions, and considerations in future proposals by the Chesapeake & Ohio to acquire specific blocks of Pere Marquette stock. (See 150 I.C.C. 751).

Benefits.—Officers of the Chesapeake & Ohio were placed in corresponding positions with the Pere Marquette on May 28, 1929; and under this joint management both carriers have profited in economies and in increased traffic. [fol. 13] Annual savings in overhead expense are estimated at $500,000, and savings from more efficient operation of the Pere Marquette, though not ascertainable, are believed to exceed that amount. With corporate affiliation, naturally each railroad became the other's preferred connection at Toledo. Statistics, in carloads, of interchange between the two during each of the past 21 years follow:

Delivered by Chesapeake & Ohio

Year	Coal			Other Freight	Total	Delivered by Pere Marquette	Total interchange
	Revenue	Fuel	Total				
1925	19,824	8,636	28,460	4,407	32,867	10,252	43,119
1926	18,432	12,273	30,705	5,114	35,819	8,923	44,742
1927	10,688	13,455	24,143	5,532	29,675	8,263	37,938
1928	34,075	10,749	44,824	7,582	52,406	8,520	60,926
1929	33,179	14,052	47,231	6,839	54,070	8,884	62,954

1930	32,039	10,641	42,680	6,813	49,493	10,487	59,980
1931	34,815	7,934	42,749	6,495	49,244	7,944	57,188
1932	34,168	6,654	40,822	4,804	45,626	5,461	51,087
1933	39,449	7,159	46,608	5,821	52,429	7,794	60,223
1934	42,845	6,947	49,792	6,936	56,728	8,256	64,984
1935	41,089	7,291	48,380	7,852	56,232	10,312	66,544
1936	52,837	9,333	62,170	8,871	71,041	12,772	83,813
1937	51,087	8,583	59,670	9,418	69,088	13,677	82,765
1938	40,775	7,725	48,500	7,888	56,388	9,843	66,231
1939	43,656	7,993	51,649	9,087	60,736	11,530	72,266
1940	45,196	10,882	56,078	10,645	66,723	13,204	79,927
1941	47,324	10,023	57,347	12,243	69,590	15,259	84,849
1942	51,383	11,523	62,906	9,151	72,057	13,568	85,625
1943	52,166	14,387	66,553	10,269	76,822	12,867	89,689
1944	52,359	10,174	62,533	10,606	73,139	13,889	87,028
1945	44,826	5,048	49,874	10,357	60,231	13,330	73,561

The Pere Marquette serves the only coal mine in operation in Michigan. Its traffic from this source in 1945 amounted to only 68,455 tons. The following tabulation shows the volume, in tons, of revenue coal which it received in interchange with other railroads during recent years:

	1940	1941	1942	1943	1944
Coal receipts:					
All connections	4,101,785	4,129,459	4,607,025	4,759,141	5,087,953
From Chesapeake & Ohio (Toledo)	2,741,262	2,777,990	3,221,468	3,516,449	3,276,966

[fol. 14] The volume of this traffic originated by the Chesapeake & Ohio that moved cross-lake was, at 55 tons to the car, 273,295, 261,800, 324,720, 346,940, and 299,420 tons. The Pere Marquette receives more loaded cars from the Chesapeake & Ohio at Toledo than it receives from any other single railroad at any junction point, and in volume nearly 80 percent of this business is coal.

Complete Unification

During the war years, 1941-45, the Pere Marquette operated at peak capacity. In 1942 it embarked on a debt reduction program and, with favoring bond-market conditions, by early 1945 succeeded in refunding its first-mortgage bonds, with a reduction in annual interest charges from more than $3,200,000 to approximately $1,840,000. With improvement in the financial condition of the Pere Marquette, interest in complete unification was revived in November 1943. Then, for the first time, the Chesapeake & Ohio was prepared to consider seriously assumption of the Pere Marquette's obligations.

The Chesapeake & Ohio's merger offer to the Pere Marquette was approved by the latter's directors on December 4, 1945, and on February 19, 1946, the directors of the Chesapeake & Ohio and the directors of the Pere Marquette entered into the agreement of merger herein presented for the Commission's consideration.

The proposed merger would be accomplished under enabling statutes of the State of Virginia and the State of Michigan. Section 3822 of the Code of Virginia of 1919, as amended, requires that an agreement of merger be adopted by a majority of all the votes cast at the meeting of stockholders at which the proposal is presented, and sections 3822-a and 3822-b provide a remedy for dissatisfied stockholders. The Michigan Railroad, Bridge and Tunnel Act formerly permitted consolidation or merger of any railroad company of that State, but specifically excepted *merger* of a Michigan company into any corporation not organized under its laws. Thus, ordinarily, the elected alternative of merger of the Pere Marquette, a Michigan corporation, into the Chesapeake & Ohio, a corporation of Virginia, would not have been capable of accomplishment, but the barrier was removed, on recommendation of the Governor, for the purpose of enabling the contemplated merger of the Pere Marquette into the Chesapeake & Ohio, by an amendment unanimously passed by both houses at a special session of the legislature, and approved by the Governor on February 18, 1946. The applicants state that the amended Michigan statute does not give to any dissenting stockholder any rights of appraisal. Section 22.233 of Michigan Statutes Annotated requires that an agreement of merger must be sanctioned by a majority vote of the stockholders of each class of stock having voting powers, at separate meetings of the stockholders of each corporation involved in the merger.

The reasons assigned for electing merger, rather than consolidation, are that merger is easier to handle mechanically, and is more economical in avoiding the issue of stock of a new consolidated company.

Stockholders' action.—The merger agreement was submitted to a meeting of stockholders of the Chesapeake & Ohio held on April 23, 1946, and to a meeting of stock-

holders of the Pere Marquette held on May 7, 1946. An analysis of the votes follows:

[fol. 15]

Stock	Chesapeake & Ohio	Pere Marquette[2] Common	Pere Marquette[2] Preferred	Pere Marquette[2] Prior preference	Pere Marquette[2] Total
Total number of holders	82,794	832	773	1,183	.....
Shares:					
(a) Voted for merger by Chesapeake & Ohio[1]	606,634	313,900	[3] 21,950	.....	335,850
(b) Voted for merger by others	3,931,812	57,139	51,280	79,889	[4] 188,308
(c) Voted for merger, total	4,538,446	371,039	73,230	79,889	524,158
(d) Voted against merger	51,785	27,673	30,034	5,907	63,614
(e) Total voted	4,590,231	398,712	103,264	85,796	587,772
(f) Represented but not voted	23,237	800	200	100	1,100
(g) Unrepresented	3,043,886	50,948	20,826	26,104	97,878
(h) Total outstanding	7,657,354	450,460	124,290	112,000	686,750
(i) Owned by others	7,050,720	136,560	102,340	112,000	350,900
Ratios, in percentage:					
(c) to (h)	59.27	82.37	58.91	71.33	76.32
(c) to (e)	98.87	93.06	70.91	93.11	89.18
(e) to (h)	59.95	88.51	83.08	76.60	85.59

Notes:

[1] Or, in the case of Chesapeake & Ohio stock, by the Alleghany.

[2] Including 6,000 shares owned by the Western Pocahontas Corporation, and 2,000 shares owned by the Manistee & Northeastern Railway Company, a wholly owned Pere Marquette subsidiary.

[3] Giving effect to voting-trust certificates issued in connection with reorganization.

[4] Vote by others includes 76,871 shares of Chesapeake & Ohio common, 760 shares of Pere Marquette prior preference, 1,126 shares of Pere Marquette preferred, and 1,566 shares of Pere Marquette common held by Chesapeake & Ohio or Pere Marquette officers, directors, and "associates" of such individuals. The term associates includes relatives by marriage.

Present Financial Structures

The Chesapeake & Ohio's balance sheet as of December 31, 1945, shows investment in transportation property, less recorded depreciation and amortization, $443,918,965, miscellaneous physical property, less recorded depreciation, $6,637,334, investments in affiliated companies, $61,144,660, other investments, $19,421,296, less reserve for adjustment, $2,686,901, total investments, $530,894,875; current assets $82,630,793, deferred assets $837,308, unadjusted debits $941,976; capital stock, $191,433,919, premiums and assessments on capital stock $2,301,093; long-term debt, funded

debt unmatured $164,373,000 and equipment obligations $40,873,000, total, $205,246,000; current liabilities $44,734,820, deferred liabilities, $1,550,368, unadjusted credits $5,430,454; and surplus, unearned $281,135, earned, appropriated, $16,408,664, and unappropriated, $147,918,499, total, $164,608,298. Its authorized capital stock consists of $300,000,000 of common, divided into 12,000,000 shares of $25, par value, and preference stock up to an aggregate par amount not exceeding at the time it is issued 40 percent of the sum of the total capital stock (including the preference stock so issued) then outstanding, plus corporate surplus. The stock now outstanding consists of 7,656,198 shares of common, 289 shares of old $100-par stock not yet exchanged for the $25-par stock in accordance with the plan of exchange heretofore approved by the Commission,[3] and common-stock scrip in the amount of $69.44. No shares of preference stock are outstanding.

[fol. 16]

The Pere Marquette's balance sheet as of December 31, 1945, shows investment in transportation property, less recorded depreciation and amortization, $114,453,874, miscellaneous physical property, less recorded depreciation, $1,083,622, investments in affiliated companies $14,961,990, other investments $687,684, total investments $131,558,926; current assets $22,078,934, deferred assets $1,154,490, unadjusted debits $378,873; capital stock $68,673,612; long-term debt, funded debt unmatured $49,749,000, and equipment obligations $6,357,736, total $56,106,736; current liabilities $11,157,664, deferred liabilities $572,512, unadjusted credits $1,475,603; and surplus, unearned, $10,013 and earned, $17,175,083, total $17,185,096. Disregarding small amounts of scrip, the Pere Marquette has outstanding 450,448 shares of common stock, 124,288 shares of 5 percent cumulative preferred stock, and 111,999 shares of 5 percent cumulative prior-preference stock. All shares are of $100 par value, and each share of all classes is entitled to 1 vote.

Agreement of Merger

When effective. The agreement between the directors of the Chesapeake & Ohio and the directors of the Pere Marquette provides that the contemplated merger will become

[3] See *Chesapake & O. Ry. Co. Stock*, 166 I.C.C. 150.

effective only if the terms and conditions set forth therein are met. The essential conditions are that (1) approval and authorization of the Commission must be obtained; (2) the holders of (a) at least 98 percent of the outstanding prior-preference stock of the Pere Marquette and at least 98 percent of its outstanding preferred stock and common stock held by others than the Chesapeake & Ohio and (b) at least 98 percent of the outstanding common stock of the Chesapeake & Ohio must approve the agreement and the merger; provided, however, that if such votes and assents are less than the required percentages specified above but are sufficient to satisfy the statutory requirements of the States of Virginia and Michigan, and if the board of directors of each of the parties to the agreement determines that it is practicable and desirable and in the interest of such party to consummate the merger with the votes and assents then obtained, such determination will be certified in the certificates accompanying the agreement, and the agreement and the certificates will thereupon be filed in the proper public office of the State of Michigan and with the State Corporation Commission of Virginia. But if, in the absence of the 98 percent vote or assent the board of directors of either of the parties is of the opinion that the merger is impracticable or undesirable, it will give notice of such determination to the other party, and thereupon the agreement will terminate and be of no effect. If and when all the conditions precedent mentioned above have been performed and fulfilled, and a certified executed counterpart of the agreement has been filed in the proper public office of the State of Michigan, the merger will become and be effective on the date, hereinafter referred to as the merger date, when a certified executed counterpart of the agreement is, by order of the State Corporation Commission of Virginia, admitted to record in its office.

[fol. 16a] If any stockholder who has not voted for the merger or otherwise assented to it desires to dissent therefrom, he may, and if so provided at the time by the law of the Commonwealth of Virginia he shall, serve notice of such dissent on certain officers of his corporation, or on the statutory agent thereof, at any time within 3 months after the date of the meeting of the stockholders of his corporation to act on the agreement of merger, without awaiting the consummation of the merger.

Effect of Merger

Upon the merger date the corporate existence of the Pere Marquette will continue in the Chesapeake & Ohio insofar as provided by law, but otherwise will cease upon such date, and thereupon the two companies will be considered as a single corporation, namely, The Chesapeake and Ohio Railway Company, which will continue as a corporation of the Commonwealth of Virginia, possessing all the powers of both companies. All the property of the two companies, and estates and interests therein, leases, leasehold interests, agreements, contracts, debts due to each, things in action, name, undertakings, rights, powers, franchises, privileges, and immunities, will be deemed to be vested in or remain vested in the Chesapeake & Ohio without further act or deed.

Capital Stock

The maximum number of authorized shares of the capital stock of the Chesapeake & Ohio will be 12,650,000, divided into 650,000 shares of preferred stock of the par value of $100 each, and 12,000,000 shares of common stock of the par value of $25 each. The minimum number of shares of stock will be 10 shares of common stock.

Preferred Stock

The board of directors of the Chesapeake & Ohio may authorize the preferred stock to be issued in series. The shares of different series may vary as to (a) the designation thereof; (b) the rate at which dividends are payable on the shares of such series and the dividend-payment dates; (c) the price or prices payable in respect of the shares thereof in case of redemption; (d) the amount payable in respect of the shares in case of liquidation, dissolution, or winding up of the corporation, hereinafter called the liquidation price, and the amount payable, if any, in addition to the liquidation price for such series in case such action be voluntary, hereinafter referred to as the liquidation premium; (e) the amount of the retirement or sinking fund, if any, provided for the purchase or redemption of the shares of such series, in addition to the retirement fund provided for in section 6, division A, of article VI of the agreement; and (f) the right, if any, to convert the shares of such series into shares of any other class or classes of

stock or of any other series of the same class, and the rate or basis, time, manner, and conditions of conversion or the method by which the same may be determined.

The shares of all series of preferred stock will be equal in all respects except as, consistently with section 1 of article VI of the agreement, may be otherwise determined by the board of directors prior to the issue thereof, and all shares of each series will be equal in all respects.

Dividends. The holders of the preferred stock of each series will be entitled to receive, if and when declared payable by the board of directors, dividends at, but not exceeding, the dividend rate for such series, payable on such dates as will be fixed therefor. The dividends will be cumulative but those in arrears will not bear interest, and no dividends will be declared or paid upon or set apart for the common stock unless and until full dividends on the outstanding preferred stock have been paid, or declared and set apart for payment, with respect to all past dividend periods and the current dividend period. Dividends on all shares of the preferred stock of each series will begin to accrue [fol. 17] and be cumulative from the date of the initial issue of any shares of such series, but (a) all dividends declared payable to the holders of record of preferred stock of any series as of a date on which shares of such series are owned by the corporation will be deemed to have been paid in respect of such shares owned by it on such date, and (b) in the event of the issue of additional shares of preferred stock of any series subsequent to the date of the initial issue of shares of such series, all dividends declared payable to the holders of record of preferred stock of such series as of a date prior to such additional issue will be deemed to have been paid in respect of the additional shares. Current dividends will not be paid or set apart for payment on the preferred stock of any series unless and until full dividends for all past dividend periods on the outstanding preferred stock of all series have been paid, or declared and set apart for payment; and if a default exists in the payment of dividends on all series of preferred stock, no dividends will be declared on the preferred stock of any series unless dividends are declared on the preferred stock of all series then outstanding, in proportion to the aggregate amounts of the deficiencies in payment of such full dividends for the respective series.

Preference on liquidation, etc. In the event of any liquidation, dissolution, or winding up of the corporation, the holders of the preferred stock of each series will be entitled to receive, for each share thereof, the liquidation price for such series; plus, in case such liquidation, etc., is voluntary, the liquidation premium for such series, if any, together in all cases with a sum equal to all dividends accrued or in arrears thereon, before any distribution of the assets is made to holders of common stock; but the holders of the preferred stock will not be entitled to any further participation in such distribution. In the event the assets distributable among the holders of the preferred stock are insufficient to permit payment in full, then such assets will be distributed among such holders ratably in proportion to the full preferential amounts to which they are respectively entitled.

Redemption. The corporation may, at its option, upon not less than 30 days' notice, at any time or from time to time, except as otherwise provided in the agreement with regard to the 3½-percent convertible preferred stock, redeem the whole or any part of the preferred stock, or of any series thereof by lot, at the redemption price for such series, together with a sum equal to all dividends accrued or in arrears thereon as of the redemption date; but the corporation may not redeem less than all of the preferred stock at any time when full dividends with respect to all past dividend periods on the outstanding preferred stock have not been paid, or declared and set apart for payment.

Voting rights. Each holder of preferred stock will be entitled to one vote for each share standing in his name on all matters lawfully coming before the shareholders, and the holders of preferred stock will not be entitled to any separate class vote on any matter except in connection with the increase in the number of shares of such stock, as hereinafter stated, or as required by law.

Retirement fund. As and for a retirement fund for the purchase of preferred stock, the corporation will, within 30 days after the merger, set aside the sum of $250,000, and, so long as accrued dividends on all shares of outstanding preferred stock have been paid for all past dividend periods, it will on March 1 of the year succeeding the first full calendar year after the merger date, and on March 1 of each year thereafter, set aside an amount equal to 5 percent of its residuary earnings, as defined in the agreement, for the

preceding calendar year, or an amount equal to the difference between the sum, if any, so set aside and $1,000,000, whichever amount is less. Such fund will be used, in whole or in part, on such occasions as may be determined by the board of directors, for the purchase of shares of preferred stock of any series in the open market or at public or private sale at not more than the redemption price thereof, plus brokerage commissions.

[fol. 18] *Cancelation of reacquired shares.* All shares of preferred stock reacquired by the corporation through redemption, purchase through any retirement or sinking fund, or conversion into common stock will be canceled and retired, but such cancelation and retirement will not reduce the maximum authorized amount of the preferred stock.

No preemptive rights. The holders of preferred stock of the corporation will have no preemptive rights to purchase, or to have offered to them for purchase, any of the stock of any class or any other securities of the corporation which may be from time to time authorized, offered for sale, disposed of, or issued.

3½-percent convertible preferred stock. The first series of preferred stock will be designated as 3½-percent convertible preferred stock, of which 211,429.4 shares will be issued in conversion of shares of stock of the Pere Marquette when the proposed merger becomes effective. The dividend rate on the shares of such series will be $3.50 a share a year, and the dividend-payment dates will be February 1, May 1, August 1, and November 1 of each year. The liquidation price of the shares of such series will be $100 a share and the liquidation premium $5 a share.

Conversion right of 3½-percent convertible preferred stock. Each share of 3½-percent convertible preferred stock may, at the option of the holder thereof, be converted at any time into fully paid and non-assessable shares of common stock of the corporation at the conversion ratio in effect at the time of conversion, determined as hereinafter stated, upon the surrender to the corporation for such purpose of the certificate representing such stock, but in respect of any stock called for redemption the conversion right will expire at the close of business on the day preceding the redemption date. No adjustment will be made on account of dividends accrued or in arrears on the 3½-percent convertible preferred stock surrendered for conversion or for dividends on common stock issued upon such conversion.

In the event that a holder of convertible stock, upon such conversion, becomes entitled to receive a fractional interest in one share of common stock, the corporation will issue, in lieu of a fractional share certificate, a transferable non-dividend-bearing, nonvoting scrip certificate, in such form and expiring after such reasonable time as the board of directors may have prescribed before the issue thereof, the scrip certificate to be exchangeable in amounts aggregating one or more full shares for a common stock certificate representing such share or shares, together with a new scrip certificate of like tenor for any remaining fractional right.

Initially, the conversion ratio will be 1.6 shares of common stock for each share of convertible preferred stock, based on a fixed conversion price of $100 a share for the preferred stock and an initial conversion price of $62.50 a share for the common stock, but if the happening of one or more of the events specified hereinafter produces an adjusted conversion price of the common stock, a new conversion ratio, determinable by dividing $100 by such adjusted conversion price, will be established provided such quotient will result in an increase or decrease in the conversion ratio then in effect of one-fortieth of a share, or any multiple thereof. Smaller fractions will be disregarded unless and until their cumulative effect will be to change the conversion ratio by one-fortieth of a share.

In case the corporation subdivides the outstanding shares of common stock into a larger number of shares, the conversion price in effect immediately prior to such subdivision will be reduced proportionately, and, conversely, in case the outstanding shares of common stock are combined into a smaller number of shares, the conversion price in effect immediately prior thereto will be increased proportionately. In the event the corporation issues any shares of common stock, other than those mentioned below, for a consideration per share less than the conversion price in effect immedi- [fol. 19] ately prior to the time of such issue, or without consideration, then the conversion price will be adjusted to the price obtained by multiplying the number of shares of common stock outstanding immediately prior to such issue by the then existing conversion price, adding to the result so obtained the value of the consideration, if any, received by the corporation upon such issue, and dividing the sum so obtained by the total number of shares of com-

m[illegible]n stock outstanding immediately after such issue. There will, however, be no adjustment of the conversion price because of any of the following issues of common stock: (a) Shares issued or issuable in conversion of shares of the Pere Marquette; (b) shares issued upon conversion of any convertible securities, (such securities being defined in the agreement as any stock or other securities convertible into or exchangeable for shares of common stock), or upon the exercise of any rights, warrants, or options; and (c) shares theretofore acquired by the corporation and then held in its treasury. Common stock issued as a stock dividend will be deemed to have been issued without consideration.

If and whenever the corporation issues any convertible securities, as defined above, or any rights, warrants, or options to purchase common stock or convertible securities, then such issue will be deemed to be the issue of the total maximum number of shares of common stock necessary to permit the conversion or exchange of all such convertible securities, or the exercise of all such rights, warrants, or options; and the amount received or receivable by the corporation as consideration for the issue thereof, plus the minimum aggregate amount, if any, payable to the corporation upon such conversion, exchange, or exercise, will be deemed to be the consideration actually received for such common stock, and the maximum number of shares of common stock required to be issued as aforesaid will, for that purpose, be deemed to be outstanding thereafter. Upon the expiration of such conversion or exchange privilege or of such rights, warrants, or options, if any thereof have not been exercised, (1) the number of shares of common stock deemed to have been issued and outstanding by reason of the fact that they were issuable upon the exercise of such conversion or exchange privilege or of such rights, warrants, or options, which were not so converted, exchanged, or exercised, will no longer be deemed to be issued and outstanding; and (2) the conversion price will be readjusted and thereafter be the price which it would have been had adjustment been made on the basis of the issue only of the shares of common stock actually issued upon the exercise of such conversion or exchange privilege or of such rights, warrants, or options.

If any shares of common stock or any convertible securities or any rights, warrants, or options to purchase any

such stock or securities are to be issued, in connection with a purchase of assets or upon a merger of another corporation into the Chesapeake & Ohio, for a consideration other than cash, or a consideration which includes cash, if such cash constitutes a part of the assets of a corporation or business substantially all the assets of which are being received as such consideration, then the board of directors of the corporation will, solely for that purpose, determine the fair value of such consideration, and such common stock, convertible securities, rights, warrants, or options will be deemed to have been issued for an amount of cash equal to the value so determined.

In case of any reclassification or other adjustment of the capital stock of the corporation, each share of the 3½-percent convertible preferred stock will thereafter be convertible into the number of shares of stock or other securities to which a holder of the number of shares of common stock of the corporation deliverable upon conversion of such share of preferred stock would have been entitled upon such reclassification or other adjustment.

In the event of a consolidation of the corporation with another corporation or corporations, or of a merger of the corporation into another corporation, each share of 3½-percent convertible preferred stock will at the option of the holder thereof, be exchangeable (1) for stock or other [fol. 20] securities of such consolidated corporation or of the corporation into which merger is effected at the ratio and upon the terms and conditions specified in the articles or agreement of consolidation or merger, or (2) for the amount of stock or other securities of such consolidated or merged corporation as would, at the ratio and upon the terms and conditions specified in such articles or agreement, be given in exchange for the number of shares of common stock then issuable, in accordance with the conversion ratio in effect of that time, upon conversion of each share of 3½-percent convertible preferred stock under the provisions above mentioned.

In case (a) the corporation pays any dividend or makes any distribution upon the common stock payable otherwise than in cash, or (b) the corporation offers to the common stockholders subscription rights for any additional shares of stock of any class, or any other rights, warrants, or options, or (c) any reclassification or adjustment is made of the capital stock of the corporation, or (d) a voluntary

or involuntary dissolution or liquidation of the corporation occurs, the corporation will cause to be mailed to the holders of record of the 3½-percent convertible preferred stock and to the transfer agent of such stock, a notice of at least 10 days stating the date on which (1) a record is to be taken for the purpose of such dividend, distribution, or offering of rights, warrants, or options, or (2) such reclassification or adjustment of capital stock, or such dissolution or liquidation is to take place, and the date, if any is to be fixed, as of which holders of commmon stock of record will be entitled to exchange their shares of such stock for stock or other securities or other property deliverable upon such reclassification or adjustment of capital stock or such dissolution or liquidation.

The corporation will initially reserve 338,287.04 shares of common stock to permit the conversion into such stock of the 211,429.4 shares of 3½-percent convertible preferred stock to be issued in conversion of shares of stock of the Pere Marquette. Whenever, by reason of the provisions mentioned above, the number of shares of common stock issuable upon conversion of each share of 3½-percent preferred stock is increased, the corporation will reserve a sufficient number of additional shares of common stock to provide for such increase, subject to authorization of the issue thereof by the Commission.

Redemption provisions of 3½-percent convertible preferred stock.—The provisions applicable to the redemption of preferred stock mentioned above will apply to the redemption of the 3½-percent convertible preferred stock except as hereafter stated. The redemption price of the shares of the 3½-per cent preferred stock will be $105 a share. The redemption date will not be earlier than November 1, 1950, and thereafter will be only on a dividend-payment date, but a call for redemption may be issued at any time prior to November 1, 1950.

If upon issuing a call for redemption of all the outstanding shares of the 3½-percent preferred stock, the corporation deposits in trust with a bank or trust company the funds necessary for such redemption, and if the corporation at the same time deposits in trust with such depositary under an agreement of trust such number of shares of its common stock as may be required, at the conversion ratio then existing, to permit conversion of all such preferred stock into common stock, then all rights in the merger

agreement conferred upon the holders of such preferred stock are to cease and terminate and each such holder will thereafter have a beneficial interest in the trust proportionate to his preferred stock holding. The depositary will issue to each holder of shares of such preferred stock, upon surrender to it of the certificate therefor, a certificate representing shares of beneficial interest in the trust equal to the number of shares represented by the stock certificate so surrendered.

[fol. 21] Any holder of shares of beneficial interest will at any time be entitled, upon surrender of the certificate therefor to such depositary for redemption, to receive out of the trust funds held by the depositary an amount equal to the sum theretofore deposited by the corporation for and in respect of the shares so to be redeemed, less the aggregate amount of any sums theretofore disbursed with respect thereto pursuant to the provisions of the agreement hereinafter set forth. The depositary, upon making any such payment, will release and transfer to the corporation, out of the shares held by it in trust, the number of full shares of the common stock of the corporation to which the holder of such certificate would have been entitled upon conversion thereof into common stock.

In lieu of surrendering his certificate for redemption, any holder of shares of beneficial interest may at any time surrender his certificate therefor to the depositary for conversion into common stock, and thereupon he will be entitled to receive from the depositary such number of full shares of the common stock of the corporation held in trust, together with a scrip certificate for any fractional share, as he would have been entitled to receive from the corporation as a preferred stockholder. The depositary, upon receiving for conversion any shares of beneficial interest, will repay to the corporation, out of the funds held by it in trust, an amount equal to the sum theretofore deposited by the corporation in respect of the shares of beneficial interest so converted, less the aggregate amount of any sums theretofore disbursed with respect thereto. Until each holder of any shares of beneficial interest has surrendered for redemption his certificate therefor or has exercised his conversion right, but in no event after the redemption date, the depositary, on the first days of February, May, August, and November of each year, will distribute to such holder, out of the funds held by it in trust,

the sum of 87½ cents in respect of each share of beneficial interest then held by such holder, but any sum so distributed will be credited upon the amount distributable in respect of such share upon the redemption thereof.

If, prior to the redemption date, any change occurs in the conversion ratio, the corporation either will deposit additional shares of common stock or will be entitled to withdraw shares thereof previously deposited, so that there will be held by the depositary at all times a number of shares of common stock sufficient for the conversion of all then outstanding shares of beneficial interest at the conversion ratio then in effect. Upon the redemption date the depositary will release and transfer to the corporation all shares of common stock then held by it under the agreement.

The certificates of beneficial interest will be in such form as will be determined by the depositary, with the approval of the corporation, consistently with the provisions of the agreement, and will be transferable on the books of the depositary. Upon and after the establishment of the trust, the certificates of 3½-percent preferred stock, until so exchanged, will be deemed to be and will be certificates of beneficial interest in the trust.

All shares of common stock issued to the depositary and reacquired by the corporation because of non-exercise of the conversion privilege will be canceled and retired, but such cancelation and retirement will not reduce the maximum authorized amount of the common stock.

Common Stock

Dividends.—Dividends may be declared upon the common stock only after all dividends upon shares of preferred stock for the current and all past dividend periods have been paid, or have been declared and a sum sufficient for the payment thereof set apart, and only if the corporation has set aside all amo-nts required for the retirement fund mentioned above.

[fol. 22] *Liquidation.*—In the event of any liquidation or dissolution of the corporation, whether voluntary or involuntary, the holders of common stock will be entitled, to the exclusion of holders of preferred stock, to share ratably in the assets of the corporation remaining after payment of all amounts payable to the holders of preferred stock in accordance with their rights and privileges.

Voting rights.—Each holder of common stock will be entitled to one vote for each share of such stock standing in his name on all matters lawfully coming before the shareholders of the corporation.

Preemptive rights.—The holders of common stock will have preemptive rights to purchase shares of any class of stock of the corporation which at any time may be issued for a cash consideration, whether such stock is a part of that authorized by the merger agreement or will be hereafter authorized, as well as any securities of the corporation issued for a cash consideration which may be convertible into any of its stock or which may be issued with stock purchase warrants attached. There will, however, be no such preemptive rights to purchase any shares acquired by the corporation as a result of, or upon a dissent from, the merger, or any other shares at any time acquired or reacquired by the corporation and held in its treasury. The preemptive rights of the common stockholders will permit each such stockholder to purchase only his proportionate share of such stock or other securities, within such period and at such price and upon such terms as may be fixed by the board of directors of the corporation. No such preemptive rights will, however, exist in any holder of common stock in any case where such rights have been waived by the affirmative vote of the holders of at least two-thirds of all the shares of common stock then outstanding.

General Provisions

Issue and sale of shares.—Subject to the above-mentioned provisions, the board of directors of the corporation in its discretion and without further approval or other action by the stockholders, but subject to all requisite authorization of public authorities, will have power to cause the corporation to issue and dispose of any and all shares of preferred stock and common stock of the corporation at the time authorized but not provided in the agreement to be issued in the proposed merger, and to create, issue, and dispose of any rights or options in respect of all or any part of such shares, to such persons, at such time or times, and for such considerations as may be fixed by the board of directors.

Purchase of shares.—So long as the corporation has set aside all amounts required for the retirement fund, the board of directors of the corporation will have the power,

in its discretion and without action by the stockholders, to cause the corporation to purchase any of the shares of its capital stock of any class at such price or prices as the board may deem advisable or desirable, but, in the case of the preferred stock, at not exceeding the redemption price, plus the usual and customary brokerage commissions, but in an aggregate amount not exceeding the surplus at the time of purchase, and to cancel such shares, or to hold them as treasury stock, or to resell them for such consideration as may be approved by the board and authorized by us. The corporation will not, however, at any time purchase or otherwise acquire for a consideration less than the whole of its then outstanding preferred stock, or purchase or otherwise acquire for a consideration any shares of its common stock, while dividends on the preferred stock for a period of one or more calendar years have neither been paid, nor declared and set apart for payment.

Changes in authorized capital stock and other amendments.—The number of authorized shares of capital stock of the corporation of any class, or the amount of capital represented thereby, may, subject to our authorization, be increased or decreased, or 1 or more new classes of shares may be created, or the charter of the corporation may be [fol. 23] amended in any other way, in the manner and subject to the conditions and limitations prescribed by the laws of Virginia. So long as any shares of the preferred stock are outstanding, however, the corporation will not authorize any shares of preferred stock in addition to the 650,000 shares authorized by the merger agreement except upon the written consent, or the affirmative vote at a meeting, of the holders of two-thirds of the total number of shares of preferred stock then outstanding. Upon such vote or consent, and any requisite vote or consent of the holders of the shares of common stock then outstanding, the corporation may authorize such additional shares, or increase the maximum number of authorized shares, of the preferred stock, subject to our authorization.

Ratios of Exchange

The manner of converting the outstanding shares of capital stock of the Pere Marquette, and the distribution of the shares of the capital stock of the Chesapeake & Ohio to be issued in conversion thereof, will be as follows: Each share

of the 5-percent cumulative prior preference stock of the Pere Marquette, including all accrued and unpaid dividends thereon as of the merger date, will be converted into one share of preferred stock and one-third of one share of common stock of the Chesapeake & Ohio. Each share of the 5-percent cumulative preferred stock of the Pere Marquette, including all accrued and unpaid dividends thereon as of the merger date, will be converted into eight-tenths of one share of preferred stock and four-tenths of one share of common stock of the Chesapeake & Ohio. Each share of common stock of the Pere Marquette will be converted into one-half of one share of common stock of the Chesapeake & Ohio. All shares of the capital stock of the Chesapeake & Ohio issuable in conversion of shares of the Pere Marquette held by the Chesapeake & Ohio on the merger date will thereafter be held by the latter in its treasury, and may be sold by it, as fully paid and non-assessable shares, subject to our authorization, to such persons, at such time or times, and for such considerations, as may be fixed by the board of directors.

Each share of common stock of the Chesapeake & Ohio outstanding on the merger date, including each share of such stock held by it in its treasury, will continue to be a share of such stock, and the presently issued certificates for such stock will continue to be valid certificates therefor, but the holders thereof will be entitled to receive, in lieu of their present certificates, upon the surrender thereof, new certificates bearing on their reverse side the provisions of article VI of the merger agreement.

Upon and after the merger date, each holder of a certificate or certificates of stock of the Pere Marquette, upon the surrender thereof for cancelation to an agent to be designated for the purpose by the Chesapeake & Ohio and the Pere Marquette prior to such date, will be entitled to receive a certificate or certificates in definitive form, or in temporary form exchangeable for certificates in definitive form when prepared, for the number of full shares of the class or classes of stock of the Chesapeake & Ohio to which he will be entitled pursuant to the provisions of article VII of the merger agreement mentioned above, and for any fractional rights resulting from such exchange.

Fractional rights to stock of the Chesapeake & Ohio resulting from the conversion of shares of the Pere Marquette into shares of the Chesapeake & Ohio will be pre-

vided for in the following manner: For a period of 3 years next following the merger date, scrip certificate in bearer form will be issued for such fractional rights. At any time within such 3-year period, the corporation, upon surrender to it of such scrip certificates in amounts representing in the aggregate one or more full shares of stock of the same class, will issue a certificate or certificates for such number of full shares of such class of stock, together with a new scrip certificate for any remaining fractional right. The right to exchange script certificates for certificates repre- [fol. 24] senting full shares will expire at the end of the 3-year period. Scrip certificates will not entitle the holder thereof to any of the rights, powers, or privileges of a stockholder of the corporation, and the holder thereof will have only such rights and privileges as are expressly provided for in the agreement.

As soon as practicable after the expiration of 3 years next following the merger date, the corporation will cause to be sold for cash, at public or private sale, at the then prevailing market prices, (but at not less than par) the aggregate number of shares of each class of stock deliverable upon the surrender of all scrip certificates outstanding at the end of such period, together with an additional number of shares of each class of stock equal to the aggregate of the fractional rights in stock of such class which would result from the exchange of all certificates of stock of the Pere Marquette not surrendered for exchange during such period. To the sum of money realized from the sale of all such shares of each class of stock, there will be added the amount of all dividends declared and payable on such shares between the merger date and the date of such sale, and the total sum of money applicable to each class of stock will be held by the corporation, or an agent to be appointed by it, as a fund for the benefit of holders of scrip certificates for, and of fractional rights to, the shares of such class. Thereafter, each holder of a scrip certificate for, or of a fractional right to, the shares of either class of stock, upon surrender thereof will be entitled to receive his prorata share of the fund applicable to such class of stock, without interest, and he will have no other or further rights in respect of such scrip certificate of fractional share right.

If the corporation makes payment to any stockholder for or in respect of any shares of stock of either of the parties

to the merger agreement, whether pursuant to adjudication, compromise, purchase, or otherwise, or if the corporation at any time is subject to liability to any stockholder who has dissented from the merger and such stockholder by reason of his dissent has forfeited his right to receive or to retain the shares in respect of which he has dissented, then, in each such case, the shares of the corporation which he would have been entitled to receive or retain had he assented to the merger, or a number of shares equal thereto, may be sold by the corporation as fully paid and nonassessable shares, subject to our authorization, to such persons, at such time or times, and for such considerations, as may be fixed by the board of directors. If any shares are issued and sold under the merger agreement before any such dissenting stockholder has surrendered to the corporation his certificate for shares in respect of which he has dissented, the shares represented by such certificate, upon the surrender thereof, will be canceled, but such cancelation will not reduce the maximum authorized amount of the capital stock.

From and after the date on which certificates for full shares of stock of the corporation are made available for exchange as aforesaid, the holders of shares of stock of the Pere Marquette will not be entitled to vote at any meeting of stockholders of the corporation and will not be entitled to receive any dividends unless and until they have actually exchanged their stock certificates for temporary or definitive certificates of stock of the corporation issuable in respect thereof, dividends theretofore declared then being payable. But the corporation will at all times from and after the merger date be entitled to treat the outstanding certificates for stock of the Pere Marquette as evidencing respectively the ownership of the number of shares of stock of the corporation into which such outstanding stock of the Pere Marquette will have been converted, notwithstanding the failure of any stockholders of the Pere Marquette to exchange their certificates for certificates of stock of the corporation. After the merger date there will be no further issue or transfer of certificates of stock of the Pere Marquette, and as such certificates are presented to the corporation they will be canceled and certificates of stock of the corporation will be issued in exchange therefor as stated above.

[fol. 25] No shares of stock of the corporation will be issued in exchange for shares of the Pere Marquette owned by the latter and held in its treasury, and the shares last mentioned will be canceled and retired on the merger date.

Capital Stock to Be Issued in Connection with Merger

The amount of the capital stock which the Chesapeake & Ohio will issue in connection with the merger will be $28,949,745, consisting of 211,429.4 shares of 3½-percent convertible preferred stock and 312,272.2 shares of common stock. All such stock will be issued in conversion of the outstanding capital stock of the Pere Marquette, including shares of such stock owned by the Chesapeake & Ohio but excluding shares held in the treasury of the Pere Marquette, and will be deemed to have been issued as of the merger date. All such shares will be fully paid and nonassessable.

Upon the merger date the amount of the outstanding capital stock of the Chesapeake & Ohio will be $220,383,595, consisting of the aforesaid 211,429.4 shares of 3½-percent convertible preferred stock and 7,969,626.2 shares of common stock.

Obligations to Be Assumed by Chesapeake & Ohio

The Chesapeake & Ohio also proposes to assume obligation and liability, as primary obliger, in respect of the payment of the principal of and the interest or dividends on all of the indebtedness of the Pere Marquette outstanding on the merger date, and, as guarantor, severally with other proprietary companies of the Toledo Terminal Railroad Company, in respect of the payment of a portion of the interest on $5,800,000 of that company's outstanding first-mortgage 4½-percent bonds. As of the date of the application the indebtedness of the Pere Marquette consisted of $59,499,000 of first-mortgage 3⅜-percent bonds, series D, $6,203,000 of equipment-trust certificates, and $906,000 of promissory notes.

The series D bonds of the Pere Marquette are a part of $60,000,000 of such bonds authorized by our order of February 24, 1945, in *Pere Marquette Ry. Co. Bonds*, 261 I.C.C. of which $49,499,000, including $50,000 reacquired and held in the treasury for sinking-fund purposes, were outstanding on April 24, 1946, and $10,000,000 were nominally issued and are held in the treasury. They are secured by the first

mortgage and deed of trust dated July 1, 1916, made by the Pere Marquette to the Bankers Trust Company and Hugh McK. Landon (R. G. Page, successor) trustees, as supplemented. They are dated March 1, 1945, bear interest at the rate of 3⅜-percent per annum, payable semiannually on March 1 and September 1, contain redemption and sinking-fund provisions, and will mature March 1, 1980.

The equipment-trust certificates and the promissory notes of the Pere Marquette were authorized by our various orders. Payments thereon are being made periodically, and since the date of the application additional trust certificates have been issued by the Pere Marquette pursuant to our authorizations. Because of this fluctuation in debt, the Chesapeake & Ohio is unable at this time to state definitely the amounts of the obligations to be assumed by it on the date of the merger. Our authorization here will be such as to cover all the obligations of the Pere Marquette of this nature outstanding on the merger date.

General Balance Sheets

A constructed balance sheet submitted in the record shows that the capitalization of the Chesapeake & Ohio after giving effect to the merger would be capital stock outstanding $220,383,689, funded debt unmatured $214,122,000, and equipment obligations $47,230,736. Total funded debt outstanding would be $261,352,736 and total capitalization, consisting of stock and funded debt, would be $481,736,425. To these figures should be added any equipment obligations authorized and issued subsequent to December 31, 1945, and deducted therefrom would be any retirements effected since that date.

[fol. 26] Road and equipment is shown at $814,951,437, with accrued depreciation thereon of $181,195,726, resulting in a net figure of $633,755,711.

Benefits of Union

Routes.—With merger of the Pere Marquette, the enlarged Chesapeake & Ohio system will have the advantage of an alternate route to Chicago, via Toledo and Grand Rapids, and direct routes to Wisconsin gateways. While the route from Russell yard, near Ashland, Ky., to Chicago, via Cincinnati, is 173.6 miles shorter, favorable gradients on the Grand Rapids route tend to offset the shorter mileage

through Cincinnati. Several large coal-consuming industries along the Chicago lake front can be served readily by the Pere Marquette route through the Indiana Harbor Belt Railway connection at Indiana Harbor. Coal now moving through Cincinnati into the Chicago switching district must be handled for greater distances to these industries by switching carriers, and the time factor in making deliveries via the Grand Rapids route compares favorably with the movement of this traffic via the Cincinnati route.

Earnings.—The applicants expect that the merger will bring about an increase in traffic and revenues of the enlarged system. At present shippers treat the Chesapeake & Ohio and the Pere Marquette as separate railroads as to routing. If they are combined, the tendency will be to afford to the Chesapeake & Ohio the longest possible haul of its own lines.

Competition.—The merger would not lessen competition, but would create a strong, well-balanced system that would afford stiffer competition to the New York Central,[6] Pennsylvania, Baltimore & Ohio, and other railroads.

Finance.—Unification of the companies would facilitate refinancing of the Pere Marquette's first-mortgage 3⅜-percent bonds. It is contemplated that this measure will be taken promptly after consummation of the merger; and expected that, if favorable market conditions continue, annual interest charges can be reduced by at least $350,000.

Further savings.—The Chesapeake & Ohio's President believes that the greatest saving, in money, will result from reduction of interest charges but, over and above monetary savings which the merger would effect, would be the advantage of having a strong, efficient transportation system. Other witnesses estimate economies from substitution of a single administrative organization for two, elimination of accounting for equipment rents, joint expense, and division of revenue, reduction in the number of reports to public regulatory bodies, and consolidation of separate off-line traffic offices, at $289,000 to $350,000 a year.

Service.—The proposed merger would not affect adversely adequate transportation service to the public. The applicants assert generally that, on the contrary, service would be improved.

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[6] See footnote 20.

Other railroads.—No other railroad has requested to be included in the merger. The policy of the merged company will be to maintain present relations with other railroads, but the applicants expect imposition of usual conditions with respect to preservation of through routes and joint rates in effect with other railroads. This will be done.

Fixed charges.—The merger would not result in any increase or decrease in indebtedness. Rentals payable by the Pere Marquette for leased roads and equipment amounted to $128,016 in 1945. We find that the proposed merger will not result in any increase in total fixed charges; and that the assumption by the Chesapeake & Ohio of payment of fixed charges of the Pere Marquette would not be contrary to the public interest.

[fol. 27] The effect on stocks outstanding in the hands of the public may be summarized, as follows:

Capital stocks

Company	Before merger			After merger		
	Shares authorized	Outstanding		Outstanding (c)		Shares authorized
		Shares	Par Value	Par Value	Shares	
Chesapeake & Ohio	12,000,000	7,657,354	$191,433,919	$215,204,300	(a)	(b)
Pere Marquette	776,842	686,735	68,673,612	.....	...	...
Total	.....	.....	260,107,531	215,204,300	(a)	(b)

(a) Common, 7,807,096, preferred, 200,269.
(b) Common, 12,000,000, preferred, 650,000.
(c) Not including 11,160 shares of preferred and 162,531 shares of common to be issued in exchange for Pere Marquette stock held by the Chesapeake & Ohio.

Thus the merger would bring about a reduction of $44,903,231, par value, in publicly held stocks. It would dispose of accrued dividends amounting, on January 31, 1946, to $13,071,025 on Pere Marquette preferred and prior-lien stocks; and dividend charges on these stocks, now amounting to $1,185,435 a year, will be replaced by an annual dividend charge on the Chesapeake & Ohio's new preferred amounting to $700,941, a reduction in preferential dividends of $480,493 a year. If all the new preferred should be converted, the publicly outstanding stock would consist of 8,127,526 shares of common having a total par value of $203,188,150, a further reduction of $12,016,150.

Employees.—The merger would not result in any change in train operation; but, in effectuating the savings mentioned, certain clerks would be displaced. The Chesapeake & Ohio and the Pere Marquette have entered into a stipulation and agreement with the Railway Labor Executives Association adopting the Washington Job Protection Agreement of May 21, 1936, for the protection of all employees represented by the association, and agreeing that the same may be accepted by the Commission, as an agreement of the character contemplated by section 5(2)(f) of the act. Similar arrangements have been made with the Brotherhood of Railroad Trainmen (Pere Marquette Company) and General Committee of Adjustment, Brotherhood of Locomotive Engineers, and the applicants are willing to enter into a similar stipulation and agreement with accredited representatives of any employees not represented by the organizations mentioned. As to such unrepresented employees we will prescribe the same conditions as in *Chicago & N. W. Ry. Co. Merger*, 261 I.C.C. 672.

Terms and Conditions

Basis of stock exchange.—The controlling factor in the determination of the offer to the Pere Marquette was recent market prices for the stocks of the carriers affected. The ratios of exchange of Chesapeake & Ohio stocks for stocks of the Pere Marquette were determined originally on August 21, 1945; and, with the exception of provisions later added to the Chesapeake & Ohio new preferred, these terms have remained unchanged.

[fol. 28] *Applicants' thesis.*—With the altered circumstances of control of the Pere Marquette by the Chesapeake & Ohio, and the need now to deal only with an unaffiliated minority, the applicants herein place paramount emphasis upon a single criterion of value. They say that commercial value is the true test of the worth of the Pere Marquette's properties, that the most important factor in determining commercial value is earning power, and that the most available means of appraising earning power are market prices for stocks. Upon this theory, the applicants contend that the ratios of exchange offered to Pere Marquette stockholders are fair.

Objections of interveners.—While dissatisfaction with the proposed merger, or its terms, has been expressed informally by various Chesapeake & Ohio stockholders and

Pere Marquette stockholders, none of the former and only a small number of the latter appeared and participated in the hearing. This fact does not affect the issue, for we are expressly enjoined by the statute to make specific findings with respect to the terms and conditions of transactions proposed under section 5(2), and this we must do if not a single share be in dissent.

Counsel representing holders of Pere Marquette common distinguishes the instant proposal from instances in which the Commission has determined commercial value as a proper basis for acquisition of short lines by the facts that their merger was not involved, and that here the Pere Marquette is a solvent company. He denies that market price of stock is the true basis of determining the value of railroad properties, asserting that stocks sell on an income basis and that, when dividends are not paid, the price is predicated on future dividend prospects. He contends that prevailing market prices for Pere Marquette common do not reflect the improved financial position of the company, and that the applicant's view that historical cost or investment value is without significance, save for rate-making purposes, is contrary to public policy.

Another intervener representing Pere Marquette shares of all three classes contends that the terms of exchange are unduly favorable to the common stockholders. He points out that the Chesapeake & Ohio's present interest is principally in Pere Marquette common, and urges that the common stock is not entitled to consideration until the claims of the preferred stockholders to the par value of their shares plus accrued dividends are fully satisfied. He suggests that, unless those stockholders receive a full measure of protection, they may be forced to have recourse to the courts. He frankly concedes that in recent years Pere Marquette earnings were affected by the war, but argues that it does not follow that its earnings hereafter will decline to the depression levels of the 1930's, and urges that full coverage of the preferred claims is warranted by the excellent condition of the Pere Marquette financially and physically, its record of good earnings in recent years, and its bright prospects for the future.

The third intervener owns 80 shares of Pere Marquette preferred. He contends that the provisions of the preferred stock with respect to cumulative dividends, redemption as a whole at par and accrued dividends, and prefer-

ence on liquidation or dissolution constitute a contract which may not be impaired by the State of Virginia or the State of Michigan in violation of section 10 of the Federal Constitution. This contention is disposed of in the discussion of our jurisdiction, *post*.

All of these interveners prefer to sell out, rather than to become stockholders of the Chesapeake & Ohio; but severally they have suggested or requested various forms of relief, namely, that the application be denied, that the Chesapeake & Ohio be required to cause the Pere Marquette preferred to be called, that the Chesapeake & Ohio be required to divest itself of control of the Pere Marquette, or that we appoint three disinterested persons to appraise each class of stock. Counsel for a fourth intervener requests, and the applicants suggest that, by condition imposed by us herein, Pere Marquette dissenting stockholders be given recourse to or the benefit of equity proceedings in Virginia.

[fol. 29] **Market Price**

Market prices, it was testified for the applicants, furnish the common denominator by which to judge comparative values of various railroad properties, particularly if there is an active market in which the particular securities are traded, because property values, current assets, good will, strategic location, and other like factors are necessarily reflected in the market prices of the securities. Any estimate of prospective earnings necessarily must be predicated, it is said, on the earnings record for past years, adjusted for all foreseeable factors that may increase or decrease the earnings for the future; but consideration must be given also to the ratio of fixed charges to earnings available for that purpose, and to other fiscal requirements, such as debt maturities and physical improvements. The record of earnings over a considerable period, if of sufficient duration to establish the degree of stability of earnings through varying business conditions, is a highly important factor.

In the determination of the ratios of exchange provided in the merger agreement, consideration was given to market prices of the stocks for a period of 6 or 7 years, including the peak prices at which Pere Marquette stocks had sold in small volume over a short period in June 1945. On the basis of closing market prices on the New York Stock Exchange on August 20, 1945, with Chesapeake & Ohio common quoted at

49¼, and Pere Marquette prior preference, preferred, and common stocks quoted at 102, 87, and 28¼ respectively, and of an assumed probable market value of 100 (par) for the Chesapeake & Ohio new preferred (before the change in its provisions), the value of the Chesapeake & Ohio offer to the Pere Marquette, when made, was:

Ratios of exchange	Pere Marquette stocks		
	Common	Preferred	Prior preference
In shares (30ths)			
Chesapeake & Ohio common	15	12	10
Chesapeake & Ohio preferred	.....	24	30
In par value	(100)	(100)	(100)
Chesapeake & Ohio common ($25)	$12.500	$10.00	$ 8.33
Chesapeake & Ohio preferred ($100)	.....	80.00	100.00
Totals	$12.500	$90.00	$108.33
In market price (Note)	$24.625	$99.70	$116.42
Ratio of offer to market price of Pere Marquette stocks, percent	87	115	114

Note: Chesapeake & Ohio stocks, August 20, 1945. This, witnesses for the applicant aver, gives due consideration to accumulated dividends.

Book value, December 31, 1945, after allowance for all accumulated dividends, Pere Marquette common, $109.13 a share, Chesapeake & Ohio 1/2 share, $23.40.

On this basis, the indicated commercial value of the entire stock equity in the Pere Marquette on August 20, 1945, was $34,522,800, in exchange for which the Chesapeake & Ohio would issue $28,949,745, par value, of its stock.

[fol. 30] Much is made in the record of the subsequent enhancement in value, on a generally rising market, of the securities offered to Pere Marquette stockholders because of augmented attractiveness of the Chesapeake & Ohio new preferred, now variously estimated to command a market price of from $110 to $120 a share. As of April 15, 1946, the closing prices for Chesapeake & Ohio common were 59, and for Pere Marquette stocks, 27½, 99 and 125½, respectively. With the new preferred priced at 110, the value of the offer to Pere Marquette stockholders in market price of Chesapeake & Ohio stocks on that date would be $29.50, $111.60, and $129.67, as compared with corresponding market prices for Pere Marquette stocks of $27.50, $99, and $125.50. These prices the stockholders had no opportunity of realizing, inasmuch as the merger proposal came on for hearing 9 days later.

In further support of the applicants' present preoccupation with market price, it is said that commercial value is

the price that property will bring in the market place in transactions between sellers under no compulsion to sell and buyers under no compulsion to buy. It is difficult to see the applicability of this definition in a situation where control of the seller and control of the buyer are in the same hands. Furthermore, it is conceded that market price is unstable, likely to be affected by remote circumstances, and subject to radical change overnight. Market appraisals of prospects could not have been much more mistaken than when they supported a price of $133 a share for Pere Marquette common in 1928. The Pere Marquette's future earnings will be as they may. They may be affected by conditions that affect the market, but they will not be affected by what the market expects that they will be. In the discharge of our duty under the statute to find whether the terms and conditions proposed for the merger are just and reasonable, we cannot confine our inquiry to market opinion, but must give consideration to all relevant elements of value. This, it is said, the market itself considers in appraising the worth of property, and this the Chesapeake & Ohio itself urged in the earlier proceedings.

Earnings

On the subject of past earnings the studies of the applicants do not extend beyond the advent of Chesapeake & Ohio control of the Pere Marquette. In general, the intervening stockholders insist that some weight should be accorded to the Pere Marquette's prosperity during the decade following the first world war.

Change in Management.—Until 1929, the Pere Marquette was independent of the Chesapeake & Ohio. The testimony tends to reflect on the previous Pere Marquette management in charging that it was neglectful of the physical condition of road and equipment, and pursued an extravagant dividend policy at a time of "lush" prosperity. Under different auspices, the Chesapeake & Ohio did not think this in 1928, and itself pursued the same policy through 1930. For reforms occurring since 1937, reference is made to *Chesapeake & O. Ry. Co. Purchase, supra.* It is to be supposed that this wiser concern for efficient management and operation will continue and eventually make for the best interests of stockholders, if public demand for transportation by railroad continues at normal levels.

Changes in economic conditions.—With gradual exhaustion of the timber resources of lower Michigan, salvation came to the Pere Marquette through development in this territory of many important industries engaged in or allied to the production of motor vehicles. The output of completed automobiles shipped by rail reached about the maximum in 1929, and this traffic produced high revenues for the railroad. Subsequently, truck competition appeared, and the consequent effect on rates resulted in reduced revenue from the haul of completed automobiles. Now a tendency exists among automobile manufacturers to establish assembly plants at various points throughout the country, and in Canada; and this has had the effect of reducing the volume of "setup" automobile business. Where motor [fol. 31] vehicle parts are shipped by rail from the central plant to assembly branch plants, the revenue is considerably less than in the case of completed automobiles. In General, divisions of revenue on traffic interchanged between the Pere Marquette and the Chesapeake & Ohio are on the same basis as in effect prior to 1929. During the ensuing decade from 1930 to 1939 the company's railway operating revenues fell off to $37,216,000 in the first year and declined to a low of $21,461,000 in 1932. The next year, with $21,947,000, was not much better, but earnings then improved uniformly to over $32,000,000 in 1936 and 1937, and, after receding to $25,445,000 in 1938, again exceeded $30,000,000 in 1939.

In each of the years 1940-45, in order, railway operating revenues amounted to $33,007,016, $39,048,003, $44,311,307, $55,052,804, $56,302,777, and $51,500.687. With harder use of facilities, the expense of maintaining way and structures was $4,353,334, $5,053,843, $6,122,269, $8,647,832, $9,271,285, and $9,271,285, and of maintaining equipment, $6,552,836, $7,468,478, $8,828,874, $9,453,289, $10,222,245, and $13,707,789. The carrier's tax burden was $2,408,698, $3,403,389, $4,819,071, $8,612,341, $7,164,799, and $1,201,808. It spent for additions and betterments to owned property $1,787,034, $7,958,124, $1,223,674, $1,243,323, $4,785,707, and $3,166,835.[8] Net income amounted to $1,253,067, $3,236,906, $3,569,066, $3,619,520, $3,012,076, and $2,139,121; but the only dividend paid by the company was 5 percent on the prior-preference

[8] Total expenditures for additions and betterments, 1930-45, inclusive, about $40,000,000.

stock in 1945, settling all accumulations to November 1, 1938.

The record indicates that the Pere Marquette was being prepared during this period of favoring circumstances, for inclusion in the Chesapeake & Ohio, a policy in itself not susceptible of adverse criticism.

Chesapeake & Ohio.—The parent company has operated at a profit since 1889, and since the turn of the present century it paid a dividend each year with the single exception of 1915. During the depression years, its operating revenues ranged downward from $131,588,000 in 1930 to $98,709,000 in 1932, then rose to $135,538,000 in 1936, and in 1937-38 varied from $106,376,000 to $127,347,000. It earned net income ranging from $20,682,000 in 1938, to $43,791,000 in 1936. In the years of military preparation and war activity, its annual operating revenues ranged from $132,720,000 in 1940 to $216,536,000 in 1944, and then fell off about $13,000,000 in 1945; and net income, after rising to $44,940,000 in 1941,[9] then declined to $16,380,000 in 1945.

Combined earnings.—By combining operating results of each of the two companies, adjusted only to eliminate intercompany dividends, the applicants show that, of total combined net income of $133,405,000 in the 5 years 1930-34, the Pere Marquette contributed nothing because it sustained losses in each of those years, and contributed nothing to the total combined net income of $294,861,000 for the 10 years 1930-39 because, over this entire period, it sustained a net deficit of $972,000. Considering separately the 5-year period 1935-39, however, the Pere Marquette had total income of $4,131,000, or 2.56 percent of the combined total, and in the 6-year period 1940-45, had total net income of $16,832,000, or 8.27 percent of the combined net income. For the 16-year period its contribution amounted to $15,860,000, or 3.18 percent of the total combined net income. With further adjustment of reported net income to give effect to present interest charges and the resulting increase in Federal income taxes, the indicated ratios of Pere Marquette contributions to total combined net income are, for the 5 years 1930-34, 1.76 percent, for the 5 years 1935-39, 5.76 percent, for the 10 years 1930-39, 3.9 percent, for the

[9] This peak figure was after a tax credit of nearly $12,000,000 resulting from capital losses on sale of securities.

6 years 1940-45, 9.84 percent, and for the 16 years 1930-45, 6.19 percent.

[fol. 32] With the adjustments above mentioned, the Pere Marquette deficit of $5,103,000 in 1930-34 is changed to net income of $2,740,000, net income of $4,131,000 in 1935-39 is increased to $10,276,000, deficit of $972,000 in 1930-39 is changed to net income of $13,016,000, net income of $16,832,000 in 1940-45 is increased to $20,507,000, and net income in 1930-45 of $15,860,000 is increased to $33,523,000. During all of this time the Pere Marquette was under Chesapeake & Ohio control, and total combined net income had the benefit of economies from joint management. If the railroads had been unified for operation, also, the total combined income would have had the benefit of further substantial economies which the applicants expect.

In comparisons that next follow, a close approximation of the *adjusted* average annual net income for the 16 years from 1930 to 1945, inclusive, to that for the 5 years 1935-39 is indicated:

Period	Average net income	Return on investment of		
		at 5%	at 4%	at 3½%
1930-1934 (5 years)	$ 548,000	$10,960,000	$13,700,000	$15,657,000
1930-1939 (10 years)	1,301,600	26,032,000	32,540,000	37,188,857
1940-1945 (6 years)	3,417,833	68,356,660	85,445,825	97,682,371
1930-1945 (16 years)	2,095,187	41,903,740	52,379,675	59,862,485
1935-1939 (5 years)	2,055,200	41,040,000	51,380,000	58,720,000

Taking the period last mentioned as typical of average experience under conditions affected by considerable variation of business generally recovering from the depths of depression, but as yet unaffected by war, and using the rate of return contemplated for the Chesapeake & Ohio's new preferred, a prorata equity of Pere Marquette stock in the company's investment, without regard to preferences, of about $85.50 a share is indicated.

Property Value

Book value; valuation; original cost.—The applicants are not consistent in decrying the value of the Pere Marquette's properties shown by its books as constituting only a basis for fixing rates and return on investment, while urging the desirability of the Pere Marquette's lines as an extension of the Chesapeake & Ohio. In effect the present proposal is for the purchase by the Chesapeake & Ohio of

all the tracks, engines, cars, and other properties and assets of the Pere Marquette, through the means or process called corporate merger. If the Pere Marquette's lines were not already in existence, it seems gravely doubtful that the Chesapeake & Ohio would be willing to pay the great cost of gaining access to the territory served by the Pere Marquette by constructing such lines, even if it were permitted to do so in view of the railroads already in existence in that territory. If, as stated, the Pere Marquette is a natural end-to-end extension of the Chesapeake & Ohio, if purchase by the Chesapeake & Ohio of the Pere Marquette's tracks and ferries is to have the effect of extending Chesapeake & Ohio operation and service beyond Toledo to the Michigan industrial centers, and through them, to Buffalo, on the east, and to Chicago and to Wisconsin railroad connections, on the west, it cannot be said, with any degree of sense, that the cost of providing or replacing these facilities is of minimum relevance to the fairness of the price to be paid for them. Evidently because of their views in this matter, the applicants produced no engineering witness.

The recorded investment of the two carriers, according to their books, the final value thereof for rate-making purposes, and net undepreciated additions and betterments to their properties from the respective valuation dates to December 31, 1945, are as follows:

[fol. 33]

	Chesapeake & Ohio	Pere Marquette
Book value		
Investment in transportation property, less recorded depreciation and amortization	$443,918,965	$114,453,874
Valuation		
Valuation dates	June 30, 1916	June 30, 1915
Final value for rate-making purposes, as of those dates	(a)197,460,975	(b)63,265,071
Additions and betterments, as explained above	412,650,674	74,364,501

(a) 24 Val. Rep. 451
(b) 130 I. C. C. 497

The constructed balance sheet prepared by the applicants to give effect to the acquisition by the Chesapeake & Ohio of the properties of the Pere Marquette, brings over into account 701, road and equipment property, and the surplus accounts, the balances appearing in those accounts in the books of the Pere Marquette. The accounting rules of the Commission require that the original cost of the merged property as found by the Bureau of Valuation shall be

recorded in account 701, and do not permit the bringing over of any balances in the surplus accounts of the merged company. Under these rules the difference between the consideration given for the property and the net of the assets and liabilities recorded, will remain as a debit or credit in account 702-½A, acquisition adjustment. See *Chicago G.W. R. Co. Reorganization*, 247 I.C.C. 193, and *Kansas City S. Ry. Co. - T. & Ft. S. Ry. Co. Merger Accounting*, 263, I.C.C. 563.

Price.—From the viewpoint of public interest, the price proposed to be paid by the Chesapeake & Ohio for the properties and franchises of the Pere Marquette appears to be just and reasonable. The consideration to be given by the Chesapeake & Ohio is as follows:

Cancellation of investment in stock of the Pere Marquette		$ 34,649,968
Proposed new stock, common	$ 7,806,805	
preferred	21,142,940	
	$28,949,745	
Less, held in treasury	5,179,250	23,770,495
Long-term debt of Pere Marquette assumed by the Chesapeake & Ohio:		
Funded debt	59,749,000	
Equipment obligations	6,357,736	
	66,106,736	
Less, held in treasury	10,300,000	55,806,736
Total		$114,227,199

The total is about equal to the Pere Marquette's recorded investment in transportation property, less recorded depreciation and amortization, as of December 31, 1945, $114,453,874. This does not take into account current assets amounting, on the same date, to nearly $22,000,000.

[fol. 34] *Assenting stockholders.*—The applicants contend that the exchange ratios are fair when tested by comparisons of earnings. As to Chesapeake & Ohio common shareholders, it is urged that the merger will not bring about any dilution of their participation in earnings of their company thereafter, because after deduction of the amount of annual dividends on the new preferred stock (all of which will go to Pere Marquette stockholders), $739,903, the remainder of average *adjusted* net income of the Pere Marquette for the 16 years 1930-45 ($2,095,000) would be $1,355,000, or $4.34 a share on the 312,272 shares of common to be issued in the transaction, as compared

with the Chesapeake & Ohio's average *adjusted* net income of $4.17 annually over the same period. And ample assurance that the dividend yield on the present Chesapeake & Ohio common will not be impaired is given by the fact that the average adjusted net income for the past 16 years, on a consolidated basis, is approximately $6,000,000 in excess of total dividend requirements of dividends at $3.50 a share on the new preferred and a continuation of the $3.50 rate on the common stock. In 1945, the Alleghany's income amounted to $2,565,559, of which $2,387,138, or 93.05 percent, was dividends. Of this amount, $1,819,902, or 76.24 percent, was derived from cash dividends amounting to $3 a share on the company's 606,634 shares of Chesapeake & Ohio common.[10] It seems likely that so long as the Chesapeake & Ohio continues to provide the Alleghany's chief means of livelihood, every effort will be exerted to continue dividends on Chesapeake & Ohio common, at least at the prevailing rate. In 1945, for example, the Chesapeake & Ohio paid $3, although it earned only $2.14 a share.

Dissenting stockholders.—With such assurance, it would seem that Chesapeake & Ohio stockholders might well be satisfied. These stockholders have received dividends regularly at high rates on the par value of their stock.

The stockholders of the Pere Marquette common have received no dividends since 1931,[11] and cumulative dividends are in arrears on the preferred since August 1, 1931, and on the prior preference stock since November 1, 1938. On February 1, 1946, the amounts of dividends in arrears on the preferred amounted to $72.50 a share, or a total of $9,011,025, and on the prior preference to $36.25 a share, or a total of $4,060,000.

The applicants contend that the intervening stockholders have exalted notions of their company's prospective earn-

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[10] Exclusive of an extra dividend of one-fortieth share of Pittston Company common, at the time worth 37 cents at market value.

[11] Witnesses for the applicants agree that these stockholders could not expect to receive any dividend for many years.

ings, predicated on its earnings record during a period of unusual influences arising from the war emergency, and the unequal effect on the relative earning power of the two properties, of excess profits taxes and unusual amortization charges, and in this connection point out that in the first quarter of 1946 the Pere Marquette operated at a deficit of $326,971, while the Chesapeake & Ohio earned net income amounting to $8,308,022.

The applicants do, however, make the significant point that on the basis of dividends of $3.50 a share on the Chesapeake & Ohio common and new preferred, the yield on each share of Pere Marquette stock would be:

Common	$1.75
Preferred	4.20
Upon conversion	5.88
Prior preference	4.67
Upon conversion	6.77

On the whole, it would seem that the prospects of Pere Marquette stockholders for returns on their investments would be enhanced by merger of their company into the Chesapeake & Ohio.

[fol. 35] Finance Docket No. 15228—Sheet 30.

The Pere Marquette's prior-preference stock is redeemable, as a whole, at par plus cumulative dividends. In the event of dissolution, liquidation or winding up of the company, voluntary of involuntary, the holders are entitled to be paid in full, out of the company's assets, the par amount of their shares and all accumulated dividends unpaid thereon, before any amounts are paid to holders of the preferred stock or common stock. The preferred also is redeemable, as a whole, at par plus accumulated unpaid dividends, and on liquidation, dissolution or winding up, as before, the holders thereof are entitled to be paid in full, out of the assets of the company, the par amount of their shares and all accumulated dividends from and after January 1, 1919, before any amount is paid out of such assets to holders of the common stock.

Assuming all Pere Marquette stock to be worth book value, the equities of the stockholders, disregarding scrip,

according to their contract with the company, may be stated as follows:

	Total Amount	*Per Share*
Book value, all shares	$85,858,700	
Equity of prior-preference stock	15,679,860	$140.00[12]
Balance for preferred and common	70,178,840	
Equity of preferred stock	21,750,400	175.00
Equity of common stock	48,428,440	107.51

[12] November 1, 1946, assuming no dividend paid since February 1, 1946.

The objection to unqualified acceptance of such calculations is that no assurance can exist as to what the Pere Marquette's assets would bring on *actual* liquidation. If the average 1935-39 earnings, capitalized at 3½ percent, *is* substituted for book value, the calculation would be as follows:

	Total Amount	*Per share*
Investment	$58,720,000	
Equity of prior-preference stock	15,679,860	$140.00
Balance for preferred and common	43,040,140	
Equity of preferred stock	21,750,400	175.00
Equity of common stock	21,289,740	47.26

If it were considered that the preferred and prior-preference stock-holders ought to be satisfied with accruals of dividends for years in which, although not declared, such dividends actually were earned, namely $45 and $30, respectively, the amount left for the common would be $26,138,370, or about $58 a share. In the years 1936-37 and 1940-45, in order, net earnings applicable to the common stock amounted to $3.50, $1.08, 16 cents, $4.56, $5.30, $5.40, $4.06, and $2.13 a share. Declaration of dividends is within the discretion of directors so long as their policy in this regard

does not oppress the stockholders. No dividends on the common were declared or paid in the years mentioned, and while it is not within the Commission's province to pass on the question whether or not this oppressed the stockholders, we properly may observe that other use of funds should make for their long-term best interests in protecting their equities against creditors and in preserving their company's property against deterioration.

[fol. 36] The expectations of Pere Marquette stockholders as stockholders of the Chesapeake & Ohio have been set forth in a previous paragraph. With the exchange, the holders of preferred and prior preference stock are entitled to expect, on the basis of the applicants' testimony, regular annual returns of from $4.20 to $5.88 and from $4.67 to $6.77 a share, respectively, and the holders of Pere Marquette common stock to a regular annual return of $1.75 a share. If, as testified, the prospect of any dividend on the common is indeed many years away, it is evident that, as a practical matter, a Pere Marquette common stockholder would fare much better as the owner of Chesapeake & Ohio common that he has any reasonable expectation of faring under separate operation of his railroad. An annual dividend of $1.75 a share would be equivalent to an annual return of 3½ percent on $50. This is not much under the figure of $58 a share previously mentioned.

Accordingly, considering the Pere Marquette's investment according to its books, other property values, the company's history as to earnings, its future prospects, and the market appraisal of its stocks, all as set forth above, we find that, as to the stockholders of both parties generally, the proposed ratios of exchange, stock issues, and assumptions of indebtedness are just and reasonable.

Jurisdiction

Counsel for a fifth intervener correctly contends that the authority conferred on us by section 5 of the act is exclusive, primary, and plenary. See section 5(11). Counsel contends that the terms and conditions proposed for the merger are not just and reasonable; that they deprive the Pere Marquette preferred stockholders of contract rights and, therefore, are not equitable; and that they violate Michigan laws. He argues that, if we remit the dissenting stockholders to remedies in the State courts, thereby we would decline to exercise our jurisdiction, and so fail to perform our duty

with respect to determining terms and conditions as expressly provided in section 5(2). Furthermore, he suggests, if we should do this without careful renunciation of intention to pass upon contract rights, the dissenters then would be met in the courts by the plea that Congress has placed the jurisdiction with us. Counsel for the Pere Marquette has joined with opposing counsel in debating the dissenters' rights under Michigan laws.

The authority to authorize unification of railroad properties was conferred by Congress in aid of its national transportation policy; and the criterion to be applied by us in the exercise of such authority is that of the controlling public interest, *State of Texas* v. *United States*, 292 U.S. 522. We are to be guided primarily by consideration for adequacy of transportation service, its essential conditions of economy and efficiency, and appropriate provision and best use of transportation facilities, *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, *McLean Trucking Co.* v. *United States*, 321 U.S. 67.

From the beginning, in the initial enactment of the unification provisions by the Transportation Act, 1920, and subsequent amendments, Congress always has had regard for private property involved by requiring us to consider the terms and conditions of unification proposals by carriers; but, when we have determined applications presenting such proposals, the relief from restraints, limitations, and prohibitions of State or Federal law provided by Congress thereupon attaches. *New York Central Securities Corp.* v. *United States*, 54 Fed. (2d) 122; affirmed, *Same* v. *Same*, 287 U.S. 12.[13]

As the Interstate Commerce Act was amended by the Transportation Act of 1940, this relief from restraints, limitations, and prohibitions now is provided in section 5(11). It is difficult to conceive of a restraint or limitation [fol. 37] on contemplated unifications better serving to frustrate the national transportation policy than provisions of State laws for compensation of dissenting stockholders on specified bases. The prospect of facing appraisal of any considerable number of minority shares (possibly as much as 49 percent) well might give pause to potential proponents

[13] For discussion of provisions of the Ohio code prescribing the measure of rental in cases of unification by lease, see the opinion of the District Court, page 130.

of any proposal within the scope of section 5(2) and thus operate to deter contemplated steps toward accomplishment of the unification desideratum of the national policy. The applicants proposed of record that dissenting stockholders of the Pere Marquette be given the same rights of appraisal as given to dissenting stockholders of the Chesapeake & Ohio by the Virginia statute. Counsel, in oral argument, referred to the matter as a commitment and suggested that a condition accordingly be attached to our order herein. However, in stating the desirability of such a condition he conceded that it would have no effect other than upon applicant. The record is clear that applicant has tried to deal fairly, but we conclude that such a condition here is not warranted. This does not mean that the Chesapeake & Ohio and the Pere Marquette do not remain free to settle controversies with dissenting stockholders through negotiation and litigation in the courts.

The Chesapeake & Ohio, as controlling stockholder of the Pere Marquette, has an interest in the proposed merger adverse to the minority, and for that reason the terms and conditions proposed by the applicants compel close scrutiny, *New York Central Securities Corp.* v. *United States*, 54 Fed. (2d) 122. In reaching the conclusion that the terms and conditions proposed by the applicant are just and reasonable, we have undertaken to do this; and, having reached that conclusion, performance of our duty in respect to stockholders is complete, in our opinion, when we make certain that all stockholders of the same class are to be treated alike. See *Denver & S. L. Ry. Co. Control*, 252 I.C.C. 153, 198.

Whether dissenting stockholders, as members of a class created by the merger, are entitled to better treatment under their charter contract with the Pere Marquette is a question not within our province to decide, *Otis & Co.* v. *Pennsylvania R. Co.*, 61 Fed. Supp. 905. Objecting stockholders have the right to present their case before two tribunals, both charged with the duty of protecting their interests, *Cleveland, C., C. & St. L. Ry. Co.* v. *Jackson*, 22 Fed. (2d) 509. See also, *Chicago Junction case*, 264 U.S. 258, *Berg* v. *Cincinnati, N. & C. Ry. Co.*, 56 Fed. Supp. 842, and *Otis & Co., etc., supra*. Possibly the courts may be called upon to determine controversies between dissenting stockholders and their companies. Because of the expense

that might be involved, it is necessary that we consider that possibility, *State of Texas, etc., supra.*

Assuming that the number of dissenting shares may not exceed 2 percent of the total stocks, as contemplated by certain provisions of the merger agreement mentioned above, possibilities of the aggregate cash expenditure required may be explored, on various bases, as follows:

	Amount
Chesapeake & Ohio, on basis of yield:	
(a) 153,147.08 shares, at $60	$ 9,188,825
Pere Marquette common, 9,009.2 shares:	
(b) At book value, $107.51	968,579
(c) On earnings basis, $85.50	770,286
(d) Market price, August 20, 1945, $28.25	254,510
Pere Marquette preferred, 2,485.8 shares:	
(e) At book value, $175	435,015
(f) On earnings basis, $85.50	212,536
(g) Market price, as before, $87	216,265
Pere Marquette prior preference, 2,240 shares:	
(h) At book value, $140	313,600
(i) On earnings basis, $85.50	191,520
(p) Market price, as before $102	228,480
Totals:	
(a), (d), (e), and (h)	10,906,019
(a), (c), (f), and (i)	10,363,167
(a), (d), (g), and (j)	9,888,080

[fol. 38] In addition to receiving title to the Pere Marquette's property and receiving all its current assets, the Chesapeake & Ohio also would receive, into its treasury, 157,588 shares of its own common stock and 638 shares of its new preferred stock in exchange for the Pere Marquette shares which it now owns, and 5,745 shares of its own common and 4,229 shares of new preferred in respect of exchange rights forfeited by Pere Marquette dissenting stockholders; totals, common, 163,333, and preferred, 4,867. These shares the Chesapeake & Ohio intends to sell. Sale of the common at a price roughly equal to the market price for this stock on August 20, 1945, and of the preferred at 110, would produce proceeds amounting to $8,702,020. This amount, together with net current assets to be taken over

in the merger, not only should fully reimburse the Chesapeake & Ohio, but should exceed substantially, any probable expenditure of cash that it might be required to make in connection with the merger.[14] Accordingly, it appears that consummation of the merger will not involve a burden of excessive expenditure.

Marine Operations

The Pere Marquette's car-ferry operations have been described generally above. It owns nine vessels having a ledger value of $8,916,046, of which six are used in service across Lake Michigan and three are used in operating across the Detroit River. In addition to railroad rolling stock, the Lake Michigan ferries handle other traffic. By certificate dated February 23, 1944, issued in *Pere Marquette Ry. Co. Common Carrier Application*, 260 I.C.C. 206, Docket No. W-887, the Pere Marquette was authorized to operate by self-propelled vessels in interstate or foreign commerce, in the transportation of passengers, baggage, and motor vehicles loaded and empty, between the ports of Ludington and Milwaukee, Manitowoc, and Kewaunee. Upon effectuation of the proposed merger, the principal officers and operating personnel of the Pere Marquette presently engaged in operating its vessels will be continued in the surviving company's employment.

The Chesapeake & Ohio's own principal officers and operating personnel have had long experience in the transportation of persons and property by ferries, barges, and carfloats across Hampton Roads, between Newport News and Norfolk, Va. It now operates four tugs, four carfloats, and seven barges between these ports, and also operates two steamers carrying passengers.

While the applicants have assumed that the Commission's determination in *P.M. and B.& L.E.R.R. Cos. Operation of Car-Ferry Boats*, 34 I.C.C. 86, decided May 11, 1915, would accrue to their benefit, as successors of the old Pere Mar-

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[14] At the argument we were informed that the holders of 4.46 percent of the common, 10.15 percent of the preferred, and less than 1 percent of the prior-preference stock of the Pere Marquette and only the holders of about 100 shares of Chesapeake & Ohio common requested appraisal within the time limit prescribed by the Virginia statute.

quette, they ask, if it is considered necessary or desirable, that the application be treated as including, in the general prayer, a request for determination of any questions arising under section 5(14-16), commonly known as the Panama Canal Act.

In its report in the earlier proceeding, the Commission held that the old Pere Marquette was a party to paralleling through all-rail routes via Chicago to ports served by its ferryboats operating on Lake Michigan, and that within the meaning of the act it might compete with such ferryboats; but that it was not shown that its rail lines competed with its ferryboats on the Detroit River. The Commission said:

> [fol. 39] It does not appear that the Pere Marquette Railroad Company owns paralleling rails reaching the ports served by either of these (St. Clair and Detroit) River car ferries. Nor is it a part of a railroad system owning such paralleling rails. Nor does it appear that the Pere Marquette is a party to any paralleling through all-rail routes between such ports, and it does not appear, therefore, that said petitioner does or may compete for traffic with its said ferryboats within the meaning of the act.

The Commission made substantially the same findings with respect to the Lake Michigan operation, except that

> • • • it does appear from tariffs on file with the Commission that this petitioner is a party to paralleling through all-rail routes to said (Wisconsin) ports, by means of which it may compete for traffic with its ferryboats within the meaning of the act.
>
> It appears from the record that these ferryboats are a very essential part of the Pere Marquette Railroad system and enable this petitioner to participate in through transportation to the Northwest, from which it would otherwise be excluded. It further appears that the independent operation of the necessary car ferries extending from its terminus at Ludington would be impracticable, since it appears that no one would be able to operate them independently for what the petitioner could afford to pay an independent ferry for getting its cars across Lake Michigan in competition with the all-rail routes. These car-ferryboats appear

to be operated on fixed schedules to expedite the through movement of freight.

On consideration of all the facts and circumstances, the Commission found that the existing specified service by water on Lake Michigan, met all the requirements of section 5(16), and entered an appropriate order.

The sense of the situation is that when the old Pere Marquette was succeeded through reorganization in 1917, without change in the essential conditions and circumstances theretofore considered by the Commission, the legality of the car-ferry operation by the successor company was, insofar as the Panama Canal Act was concerned, *res adjudicata;* but it cannot be said that that determination is applicable to operation of the ferries by the Chesapeake & Ohio, as proposed. As amended by the Transportation Act of 1940, section 5(14) now provides:

> Notwithstanding the provisions of paragraph (2), from and after the 1st day of July 1914, it shall be unlawful for any carrier, as defined in section 1(3), or (after the date of the enactment of this amendatory section) any person controlling, controlled by, or under common control with, such a carrier to own, lease, operate, control or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which such carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

The circumstances present at the time of the previous determination are and, by the proposed merger, would be further changed. Now not only the Pere Marquette's own line to Chicago forms part of through all-rail routes to the [fol. 40] Northwest, but so, also, do the affiliated lines to Chicago owned by the Chesapeake & Ohio and by the Nickel Plate.

In each of the 5 years 1940-44, in order, the volume, in carloads, of freight traffic moved across Lake Michigan on Pere Marquette car ferries between points on or beyond the Chesapeake & Ohio and points in the Northwest was, west-bound, 5,385, 5,321, 6,592, 6,753, and 6,232, of which 4,696, 4,760, 5,904, 6,308, and 5,444 cars were coal; and east-bound, 923, 1,347, 1,810, 1,846, and 1,773, mostly products of agriculture, and manufactures and miscellaneous freight.[15]

So far as the effect on competition with the ferries is concerned, it is plainly evident that they would be benefited, rather than affected adversely by the merger, because on Chesapeake & Ohio coal destined to the Northwest it will be to the best interests of the Chesapeake & Ohio to reserve to itself the longest possible haul, with the consequent advantage of greater proportions of the revenue. In addition, the mileage would be shorter via the car-ferry routes to some of the lower Wisconsin cities.

Alleghany

In addition to its interest in the Chesapeake & Ohio, on April 15, 1946, the Alleghany owned certificates of deposit representing 263,286 shares of Pittston Company common stock,[16] 54 shares of Wheeling & Lake Erie Railway Company prior-lien stock,[17] and 20,000 shares of Atlantic Coast Line Railroad Company common stock,[18] and owned 522,900 shares, or 33.81 percent, of the Missouri Pacific Railroad Company's common stock, and $3,325,000, principal amount, of Missouri Pacific Railroad Company first and refunding mortgage 5-percent bonds, of various series and maturity dates. It also owned, among other securities, $659,000 of first-mortgage bonds of the New Orleans, Texas & Mexico

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[15] This was via Toledo. The total carloads handled were, west-bound, 31,365, 37,510, 37,190, 35,856, and 37,221; east-bound, 39,153, 47,787, 45,146, 48,317, and 49,746.

[16] Deposited with the Empire Trust Company, trustee under a deposit and trust agreement dated June 22, 1945.

[17] Deposited with J. Crawford Biggs, trustee under deposit and trust agreement dated July 30, 1929.

[18] Deposited with the Chase National Bank of the City of New York, trustee under a deposit and trust agreement dated June 14, 1945.

Railway Company and $1,196,000 of first-mortgage bonds of the International-Great Northern Railroad Company, subsidiaries of the Missouri Pacific, $33,000 of Pittston Company 5½-percent cumulative debentures, and $11,152,000 of Missouri Pacific 20-year 5½-percent convertible gold bonds,[19] and held notes of the Pittston Company for $6,375,000, given for loans from the Alleghany Company to enable the maker to redeem shares of its preferred stock heretofore deposited with the Empire Trust Company, as voting trustee, and to purchase other securities.[20]

[fol. 41] An independent director of the Missouri Pacific intervened herein. He contends that the Alleghany exercises control of that corporation and requests that we require that the Missouri Pacific stock owned by the Alleghany be trusteed. Counsel for the Alleghany concedes that upon consummation of the present plan for reorganization of the Missouri Pacific, the Alleghany would receive stock of the new company, but that, pursuant to our determination in *Chesapeake & O. Ry. Co. Purchase, supra,* such stock will have to be deposited under the indenture mentioned in footnote 18. Counsel objects to trusteeing of the stock of the present Missouri Pacific because of the expense of transfer taxes and trustee's fees. The intervenor points out that important functions are delegated to debtors under section 77B of the Bankruptcy Act, as amended, and contends that acquisition by Alleghany of a substantial volume of New York Central Railroad Company stock is an additional reason for the urgency of the requirement that the Missouri Pacific stock be trusteed, and that the existing trust agreement is inadequate. He asks that deposit of the shares of Missouri Pacific stock owned by the Alleghany under a new and appropriate agreement, after a hearing

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[19] Pledged with the Manufacturers Trust Company as part security for a loan of $9,000,000. See footnote 4.

[20] The Alleghany has reported to us, since the hearing herein, that it had purchased 225,400 shares of the common stock of the New York Central Railroad Company; and that it had deposited 162,500 shares, and was about to deposit the remaining 62,900 shares, under the indenture mentioned in footnote 30, as of December 31, 1946; and, later, that it had sold voting trust certificates for 250,400 shares of this stock to the Chesapeake & Ohio.

thereon, be required as a preliminary to any further action herein.

The effect of the order in *Chesapeake & O. Ry. Co. Purchase, supra*, is to require the trusteeing of stock of the Missouri Pacific or any successor corporation that the Alleghany may receive in the reorganization of that company. In addition, the Alleghany has committed itself in this proceeding to deposit under the trust agreement any such stock so received by it. The trust agreement with the Chase National Bank, in that proceeding, contemplates the further depositing of stock such as that here considered. So long as the title and the operation of the Missouri Pacific properties are in the hands of a trustee in bankruptcy, we think the action herein desired by this intervener is not warranted by the facts here of record.

General Conclusions

For reasons hereinbefore discussed, merger of the Pere Marquette into the Chesapeake & Ohio should be of substantial benefit to both parties to the transaction; and should be to the advantage of the public in affording to the Pere Marquette railway a higher degree of stability at times of stress, through increased support of the Chesapeake & Ohio, as owner of the property. Specifically, patrons of the Pere Marquette would have greater assurance of continued service, at least over more important system arteries, and all shippers should reap the advantage of single-line hauls and rates which combination of the two systems will make possible.

Summary of Conditions

The conditions contemplated by our findings herein and included in our order by reference to the statement thereof in this report, are:

1. As to employees who will not be protected by agreements between the carriers and duly authorized representatives of such employees, as indicated above, during the period of 4 years from the effective date of our order herein, the transactions thereby approved and authorized shall not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not

be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order.

2. The Chesapeake & Ohio shall maintain and keep open all presently existing routes and channels of trade via existing junctions and gateways unless and until otherwise ordered by us.

[fol. 42] 3. The Chesapeake & Ohio, before recording in its books acquisition of the properties of the Pere Marquette, first shall submit the related journal entries for our approval.

We find that, subject to the foregoing conditions:

1. Merger of the properties and franchises of the Pere Marquette Railway Company into The Chesapeake and Ohio Railway Company for ownership, management, and operation, and acquisition by the Alleghany Corporation of control, through The Chesapeake and Ohio Railway Company, of the properties, franchises, rights, title, and interests of the Pere Marquette Railway Company herein described, are transactions within the scope of section 5(2); that the terms and conditions proposed are just and reasonable; and that the transactions will be consistent with the public interest;

2. (a) The proposed issue of not exceeding $21,142,940 of 3½ percent convertible preferred stock, consisting of 211,429.4 shares of the par value of $100 each, and $7,806,805 of common stock, consisting of 312,272.2 shares of the par value of $25 each, the sale of all such shares of stock issuable in conversion of shares of stock of the Pere Marquette Railway Company held by The Chesapeake and Ohio Railway Company, the issue from time to time of not exceeding $8,457,176 of additional common stock, consisting of 338,287.04 shares of the par value of $25 each in conversion of the convertible preferred stock, the issue of new certificates of its common stock bearing the provisions of article VI of the merger agreement, the issue in temporary form of certificates for shares of stock in respect of which authority is hereby granted, to be exchangeable for definitive certificates, the issue, in lieu of certificates for fractional shares resulting from the conversion of stocks of the Pere Marquette Railway Company into stock of The Chesapeake

and Ohio Railway Company and from the conversion of the latter's 3½-percent convertible preferred stock into its common stock, scrip certificates in bearer form, exchangeable for full shares represented by such certificates within the periods stated above and in the merger agreement, the issue of certificates for full shares of 3½-percent convertible preferred stock and common stock in exchange for scrip certificates representing such shares, the sale of all shares of its capital stock which, or the right to which, has been forfeited to it by stockholders dissenting from the merger, and (b) the proposed assumption of obligation and liability, as primary obligor, in respect of the payment of the principal of and the interest or dividends on the aggregate amount of indebtedness of the Pere Marquette Railway Company of the nature described above outstanding on the date of the merger, and as guarantor, severally with other proprietary companies of the Toledo Terminal Railroad Company, in respect of the payment of a portion of the interest on $5,800,000 of that company's first-mortgage 4½-percent bonds, by The Chesapeake and Ohio Railway Company, all in connection with the proposed merger, as aforesaid, (1) are for lawful objects within its corporate purposes and compatible with the public interest, which are necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (2) are reasonably necessary and appropriate for such purposes; and

3. (a) Acquisition by the Chesapeake & Ohio and, through it, by the Alleghany, of ownership of the vessels of the Pere Marquette, through merger, will not prevent such vessels from being operated in the interest of the public and with advantage to the convenience and commerce of the people, and will not exclude, prevent, or reduce competition on the Pere Marquette's routes by water; and (b) the Chesapeake & Ohio is fit, willing, and able properly to perform the common carrier service by water now performed by the Pere Marquette, and transfer to the Chesapeake & Ohio of the certificate dated February 23, 1944, [fol. 43] issued to the Pere Marquette in Docket No. W-887, will be consistent with the public interest. If the transaction herein authorized is consummated, the Chesapeake & Ohio will be entitled to a certificate authorizing it to perform the water-carrier service now performed by the Pere Marquette

quette; and, upon notice that such transaction has been consummated, a certificate superseding the certificate heretofore issued to the Pere Marquette in No. W-887 will be issued to the Chesapeake & Ohio.

An appropriate order will be entered, effective 40 days from its date.

[fol. 44] ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 1st day of April, A.D. 1947

Finance Docket No. 15228

Pere Marquette Railway Company Merger, Etc.

No. W-887

Pere Marquette Railway Company Common Carrier Application

Investigation of the matters and things involved in these proceedings having been made, a hearing, having been held, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That, subject to conditions numbered 1 to 3, inclusive, merger of the properties and franchises of the Pere Marquette Railway Company into The Chesapeake and Ohio Railway Company for ownership, management, and operation, upon the terms and conditions in said report found just and reasonable, be, and it is hereby, approved and authorized.

It is further ordered, That, subject to the conditions aforesaid, The Chesapeake and Ohio Railway Company be, and it is hereby, authorized (a) to issue not exceeding $21,142,940 of 3½-percent convertible preferred stock, consisting of 211,429.4 shares of the par value of $100 each, and $7,806,805 of common stock, consisting of 312,272.2 shares of the par value of $25 each, in conversion of all the outstanding capital stock of the Pere Marquette Railway Company; (b) to sell at not less than current market prices, but at not less than par, all shares of the capital stock

issuable in conversion of the shares of stock of the Pere Marquette Railway Company held by The Chesapeake and Ohio Railway Company on the merger date, the proceeds to be used only for capital expenditures; (c) to issue from time to time not exceeding $8,457,176 of additional common stock, consisting of 338,287.04 shares of the par value of $25 each, in conversion of the 211,429.4 shares of 3½-per cent convertible preferred stock; (d) to issue to holders of certificate for its common stock outstanding on the merger date, on a share-for-share basis, new certificates of its common stock bearing the provisions of article VI of the merger agreement; (e) to issue in temporary form certificates for shares of stock in respect of which authority is hereby granted, to be exchangeable for definitive certificates; (f) to issue, in lieu of certificates for fractional shares resulting from the conversion of stocks of the Pere Marquette Railway Company into stock of The Chesapeake and Ohio Railway Company and from the conversion of the latter's 3½-percent convertible preferred stock into its common stock, scrip certificates in bearer form, exchangeable for full shares represented by such certificates within the periods stated in the report and in the merger agreement; (g) to issue from time to time certificates for full shares of 3½-percent convertible preferred stock and common stock in exchange for scrip certificates representing such shares; (h) to sell at not less than current market prices, but at not less than par, all shares of its capital stock, which, or the right to which, has been forfeited to it by stockholders dissenting from the merger, the proceeds to be used only for capital expenditures; (i) to assume obligation and liability, as primary obligor, in respect of the payment of the principal of and the interest or dividends on the aggregate amount of indebtedness of the Pere Mar- [fol. 45] quette Railway Company of the nature described in the report outstanding on the date of the merger; and (j) to assume obligation and liability, as guarantor, severally with other proprietary companies of the Toledo Terminal Railroad Company, in respect of the payment of a portion of the interest on $5,800,000 of that company's first-mortgage 4½-percent bonds; all in connection with the proposed merger.

It is further ordered, That, except as herein authorized, said securities shall not be sold, pledged, repledged, or

otherwise disposed of by The Chesapeake and Ohio Railway Company, unless or until so ordered or approved by this Commission.

It is further ordered, That, The Chesapeake and Ohio Railway Company shall report to this Commission concerning the matters herein involved as required by valuation order No. 24, effective May 15, 1928, and in conformity with the order of the Commission, by division 4, dated August 9, 1946, respecting applications filed under section 20a of the Interstate Commerce Act.

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said securities, or dividends or interest thereon, on the part of the United States.

It is further ordered, That, subject to the conditions aforesaid, acquisition by The Chesapeake and Ohio Railway Company and, through that company, by the Alleghany Corporation, through merger, of ownership of the vessels of the Pere Marquette Railway Company, be, and it is hereby, authorized.

It is further ordered, That, subject to the conditions aforesaid, transfer to The Chesapeake and Ohio Railway Company of the certificate dated February 23, 1944, issued to the Pere Marquette Railway Company in No. W-887 be, and it is hereby, approved; and that, for the purpose of giving effect to this determination, that proceeding be, and it is hereby, reopened.

It is further ordered, That following consummation of the merger herein authorized, The Chesapeake and Ohio Railway Company may perform the water-carrier service heretofore authorized by the certificate aforesaid to be performed by said Pere Marquette Railway Company.

It is further ordered, That, within 20 days from and after consummation of said merger, The Chesapeake and Ohio Railway Company shall file with this Commission (1) a statement, verified by its proper officer, setting forth all pertinent facts concerning said consummation, and (2) an opinion of counsel as to the fact of legal consummation of said merger.

It is further ordered, That, subject to the conditions aforesaid, acquisition by said Alleghany Corporation, through The Chesapeake and Ohio Railway Company, of control of the properties and franchises of the Pere Marquette Railway Company, and of the interests of said Pere Mar-

quette Railway Company in subsidiary or affiliated companies and in leases, operating contracts, and trackage agreements relating to operation over or joint use of the lines of railroad of such companies and of certain other carriers, be, and it is hereby, approved and authorized.

[fol. 46] *It is further ordered*, That, unless said merger be consummated on or before December 31, 1947, this order then shall be of no further force or effect, except as said date may be extended by supplemental order herein.

And it is further ordered, That this order shall be effective 40 days from and after its date.

By the Commission, division 4.

W. P. Bartel, Secretary. (Seal.)

[fol. 47] INTERSTATE COMMERCE COMMISSION

ORDER

Finance Docket No. 15228

PERE MARQUETTE RAILWAY COMPANY MERGER, ETC.

Present: Charles D. Mahaffie, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

Upon further consideration of the record in the above-entitled proceeding and upon consideration of the petitions in behalf of the holders of preferred stock and common stock of the Pere Marquette Railway Company for rehearing and reconsideration of the report and order of Division 4 entered herein on April 1, 1947.

It is ordered, That the effective date of the said order of April 1, 1947, be, and it is hereby, postponed pending the further order of this Commission.

Dated at Washington, D. C., this 2nd day of May, 1947.

By the Commission, Commissioner Mahaffie.

W. P. Bartel, Secretary, (Seal.)

[Vol. 48] ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D. C., on the 20th day of May, A.D. 1947.

Finance Docket No. 15228

PERE MARQUETTE RAILWAY COMPANY MERGER, ETC.

It appearing, That by report and order dated April 1, 1947, in this proceeding, the Commission, by division 4, approved and authorized, among other things, merger of the properties and franchises of the Pere Marquette Railway Company into The Chesapeake and Ohio Railway Company for ownership, management, and operation;

It further appearing, That Joseph A. Bauer, the Pere Marquette Preferred Stockholders' Protective Committee, and Albert E. Schwabacher et al., intervenors, have filed herein petitions for reargument and reconsideration of said determination dated April 1, 1947;

And it further appearing, That the Commission has considered the record herein and the reasons presented in support of said petitions, and has reached the conclusion that good cause for reargument and reconsideration has not been shown:

It is ordered; That said petitions be, and they are hereby, denied.

It is further ordered, That said order herein dated April 1, 1947, by division 4, shall become effective 15 days from and after the date hereof.

By the Commission.

W. P. Bartel, Secretary, (Seal.)

[fol. 49] EXHIBIT 1-B TO COMPLAINT—Filed June 4, 1947

May 23, 1947.

Interstate Commerce Commission
Constitution Ave. & 12th St., N.W.
Washington 25, D. C.

GENTLEMEN:

Re: Before the Interstate Commerce Commission Finance Docket No. 15228

On behalf of the intervenors, Edward Schwabacher et al. in the above entitled proceeding, it is respectfully requested that the Commission stay its order of April 1, 1947 approving the application of merger of the Chesapeake & Ohio Railway Company and Pere Marquette Railway Company. Such stay is requested in order that intervenors may perfect an appeal to the appropriate Federal Court to determine the legality of the Commission's action in failing to provide protection for dissenting shareholders. Intervenors will diligently undertake a review of the Commission's order as promptly as possible in order that the merger agreement may be carried forward at the earliest practicable time.

Intervenors feel that a stay of the Commission's action is necessary if their statutory remedy in the courts is to be effective. We believe that it is the duty of the Commission to protect the rights of dissenting shareholders. This Commission has repeatedly taken that position in the past. In the instant proceeding, relief against this refusal by the Commission to affirmatively protect the rights of intervenors can only be accorded intervenors if approval of the application of merger is withheld until such time as the appropriate Federal Court can determine whether the Commission has fully discharged its duties. If the parties are permitted to carry out their merger plan, it is obvious that it would be too late for the Commission to correct its action approving the merger should the court decide it had failed to protect the rights of intervenors.

If the Commission denies this request for a stay of its order, it will be necessary for intervenors to apply to a Federal Court for a temporary restraining order until the merits of this controversy are settled on review. This would involve both unnecessary time and expense to the Government as well as the parties. It would necessitate the calling of two instead of one three judge courts to pass upon the

issues involved. If, on the other hand, the Commission is willing to grant a stay for a reasonable length of time, it will only be necessary to call one three judge court to pass on the case.

Respectfully submitted, Carl McFarland, 1302 Eighteenth St., N.W., Washington 6, D. C., Counsel for Intervenors.

[fol. 50] Interstate Commerce Commission May 23, 1947.

Copies to R. W. Purcell, 3600 Terminal Tower, Cleveland, Ohio; J. C. Kauffman, 3016 Terminal Tower, Cleveland, Ohio; John C. Shields, 6-206 General Motors Bldg., Detroit, Michigan; A. G. Berse, 160 Fifth Avenue, New York 10, N. Y.; Jacob Shapiro, 225 Broadway, New York 7, N. Y.; Samuel W. Savage, 905 Baldwin Avenue, Norfolk 7, Virginia; E. J. Brennan, 418 Olive Street, St. Louis, Missouri; C. M. Mulholland, 741 Nicholas Bldg., Toledo, Ohio; Geo. H. Gardner, 724 Transportation Bldg., Washington, D. C.

[fol. 51] Exhibit 1-C to Complaint—Filed June 4, 1947

Pere Marquette Railway Company, Law Department

General Motors Building Detroit 2, Michigan

John C. Shields, General Counsel; Norman F. Crawford, Glenn C. Wilber, General Attorneys; Claude H. Buzzard, William R. Althans, Edward H. Goodman, Assistant General Attorneys; Horace L. Walker, General Solicitor; Lawrence Chaffee, General Attorney Richmond 10, Va.; J. C. Kauffman, General Solicitor; John J. Fitzpatrick, General Attorney; James B. Osborne, John S. Marshall, Assistant General Attorneys, Cleveland 1, Ohio; George H. Gardner, Attorney, Washington 6, D. C.

Interstate Commerce Commission May 27, 1947
Constitution Avenue and 12th St., N.W.
Washington 25, D. C.

Gentlemen:

Re: Finance Docket No. 15228

Pere Marquette Railway Company Merger, Etc.

The applicants in this proceeding have received copies of a letter dated May 24th sent to the Commission by Mr.

Carl McFarland, counsel for Intervener Schwabacher, in which Mr. McFarland requests that the Commission stay its order of April 1, 1947, approving the merger of Pere Marquette Railway Company into The Chesapeake and Ohio Railway Company "in order that intervenors may perfect an appeal to the appropriate Federal Court to determine the legality of the Commission's action in failing to provide protection for dissenting shareholders."

The Commission, upon full consideration, made its order of approval effective 15 days from and after May 20, 1947, the date interveners' petition was denied. Thus, interveners were given the ample period of 15 days in which to institute any desired proceeding. They had in excess of two months in which to prepare for any appropriate court proceeding in the event the Commission should deny their request for appraisal. The original order was dated April 1st, effective 40 days from that date, and this date was twice extended. . .

Interveners say that they intend to seek a review of the Commission's order. They have had and still have abundant time to make their application in the usual and orderly way. What they seek is to have the Commission perform a function which the Urgent Deficiencies Act (26 Stat. 219, 28 USC, paragraph 46) lodges with the district court as a discretionary matter. The writ of injunction is a gracious writ which the court may issue or withhold. Certainly it is one which should be withheld under "facts involved in the instant matter."

[fol. 52] The point that unless the Commission stay its order it would necessitate the calling of two, instead of one, three-judge courts is without merit. In the first place, if interveners are to seek the aid of the courts, the case should be presented there in toto. In the second place, if one three-judge court should take jurisdiction, there is no reason why that court should not retain jurisdiction.

These interveners do not contend that the proposed merger is not in the public interest. Mr. McFarland, in his letter to the Commission of May 24th, offers to diligently undertake a court review "in order that the merger agreement may be carried forward at the earliest practicable time." These interveners expect and desire the merger to be consummated, but they seek a price for their stock over and beyond the exchange terms which were ac-

ceptable to the great majority of shareholders and which were found by the Commission to be just and reasonable. If interveners are right in that for which they have been contending in all of their submissions to the Commission and in Mr. McFarland's letter, the consummation of the merger is a condition precedent to any satisfaction of their claims.

Should there be no further postponement of the effective date of the order approving the merger, applicants have planned to consummate the merger not later than June 5, 1947. Pere Marquette's stockholders then would participate in the dividends which have been declared on Chesapeake and Ohio common stock payable July 1, 1947, to stockholders of record June 6, 1947. It is respectfully submitted that holders of only 2100 shares of Pere Marquette stock out of a total of 686,750 shares outstanding should not be permitted to delay the merger further and thus deprive the vast majority of Pere Marquette stockholders of the benefits that will flow to them from the consummation of the merger.

It is submitted that if this Commission should accede to the extraordinary proposal of Mr. McFarland that it grant a stay and thus decide what would be a discretionary matter for the three-judge court, it would have a most discouraging significance to the great majority of Pere Marquette stockholders who want the merger to be consummated at an early date.

In behalf of the applicants and the vast majority of their shareholders and in behalf of the public which the Commission found would be advantaged by the merger, we respectfully urge that the Commission deny the request for a further postponement of the effective date of its order in this proceeding, thus permitting the merger to be consummated by June 5, 1947, and permitting applicants thereafter and in accordance with their declaration to the Commission (applicants' Reply to Petition for Rehearing and Reconsideration, page 15), to institute appropriate appraisal proceedings in the Chancery Court of the City of Richmond, Virginia.

Yours very truly, John C. Shields, 6-206 General Motors Building, Detroit 2, Michigan; Geo. H. Gardner, 724 Transportation Building, Washington 6, D. C.

[fol. 53] Copies to:

Carl McFarland, 1302 Eighteenth St., N. W., Washington 6, D. C.; A. G. Berse, 160 Fifth Avenue, New York 10, N. Y.; Jacob Shapiro, 225 Broadway, New York 7, N. Y.; Samuel W. Savage, 905 Baldwin Avenue, Norfolk 7, Virginia; E. J. Brennan, 418 Olive Street, St. Louis, Missouri; C. M. Mulholland, 741 Nicholas Building, Toledo, Ohio; R. W. Purcell, 3600 Terminal Tower, Cleveland 1, Ohio; J. C. Kauffman, 3016 Terminal Tower, Cleveland 1, Ohio; Glenn C. Wilber, 6-206 General Motors Building, Detroit 2, Michigan.

[fol. 54]

McFarland and Sellers
1302 Eighteenth Street, N.W.
Washington 6, D. C.

Carl McFarland
Ashley Sellers
Robert M. Cooper
Stephen J. Angland
Alberta Brown Murphy

Telephone
Hobart 7371

May 23, 1947

Interstate Commerce Commission
Constitution Ave., & 12th St., N. W.
Washington 25, D. C.

GENTLEMEN:

Re: Before the Interstate Commerce Commission
Finance Docket No. 15226

On behalf of the intervenors, Edward Schwabacher et al. in the above-entitled proceeding, it is respectfully requested that the Commission stay its order of April 1, 1947 approving the application of merger of the Chesapeake & Ohio Railway Company and Pere Marquette Railway Company. Such stay is requested in order that intervenor may perfect an appeal to the appropriate Federal Court to determine the legality of the Commission's action in failing to provide protection for dissenting shareholders. Intervenors will diligently undertake a review of the Commission's order as promptly as possible in order that the merger agreement may be carried forward at the earliest practicable time.

Intervenors feel that a stay of the Commission's action is necessary if their statutory remedy in the courts is to be

effective. We believe that it is the duty of the Commission to protect the rights of dissenting shareholders. This Commission has repeatedly taken that position in the past. In the instant proceeding, relief against this refusal by the Commission to affirmatively protect the rights of intervenors can only be accorded intervenors if approval of the application of merger is withheld until such time as the appropriate Federal Court can determine whether the Commission has fully discharged its duties. If the parties are permitted to carry out their merger plan, it is obvious that it would be too late for the Commission to correct its action approving the merger should the court decide it had failed to protect the rights of intervenors.

If the Commission denies this request for a stay of its order, it will be necessary for intervenors to apply to a Federal Court for a temporary restraining order until the merits of this controversy are settled on review. This would involve both unnecessary time and expense to the Government as well as the parties. It would necessitate the calling of two instead of one three judge courts to pass upon the issues involved. If, on the other hand, the Commission is unwilling to grant a stay for a reasonable length of time, it will only be necessary to call one three judge court to pass on the case.

[fol. 55]

Respectfully submitted, Carl McFarland, 1302 Eighteenth St., N. W., Washington 6, D. C., Counsel for Intervenors.

Copies to:

R. W. Purcell, 3600 Terminal Tower, Cleveland, Ohio; J. C. Kauffman, 3016 Terminal Tower, Cleveland, Ohio; John C. Shields, 6-206 General Motors Bldg., Detroit, Michigan; A. G. Berse, 160 Fifth Avenue, New York 10, N. Y.; Jacob Shapiro, 225 Broadway, New York 7, N. Y.; Samuel W. Savage, 905 Baldwin Avenue, Norfolk, 7, Virginia; E. J. Brennan, 418 Olive Street, St. Louis, Missouri; C. M. Mulholland, 741 Nicholas Bldg., Toledo, Ohio; Geo. H. Gardner, 724 Transportation Bldg., Washington, D. C.

[fol. 56] Pere Marquette Railway Company

Law Department

General Motors Building Detroit 2, Michigan

John C. Shields
General Counsel

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Glenn C. Wilber
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Claude H. Buzzard
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John J. Fitzpatrick
General Attorney
James B. Osborne
John S. Marshall
Assistant General Attorneys
Cleveland 1, Ohio
George H. Gardner
Attorney
Washington, D. C.

Interstate Commerce Commission
Constitution Avenue and 12th St., N. W.
Washington 25, D. C.

May 27, 1947.

GENTLEMEN:

Re: Finance Docket No. 15228
Pere Marquette Railway Company Merger, etc.

The applicants in this proceeding have received copies of a letter dated May 4th sent to the Commission by Mr. Carl McFarland, counsel for Intervener Schwabacher, in which Mr. McFarland requests that the Commission stay its order of April 1, 1947, approving the merger of Pere Marquette Railway Company into the Chesapeake and Ohio Railway Company "in order that intervenors may perfect an appeal to the appropriate Federal Court to determine the legality of the Commission's action in failing to provide protection for dissenting shareholders."

The Commission, upon full consideration, made its order of approval effective 15 days, from and after May 20, 1947, the date interveners' petition was denied. Thus, interveners were given the ample period of 15 days in which to institute any desired proceeding. They had in excess of two months in which to prepare for any appropriate court proceeding in the event the Commission should deny their request for appraisal. The original order was dated April 1st, effective 40 days from that date, and this date was twice extended.

Interveners say that they intend to seek a review of the Commission's order. They have had and still have abundant time to make their application in the usual and orderly way. What they seek is to have the Commission perform a function which the Urgent Deficiencies Act (39 Stat. 219, 28 USC, paragraph 46) lodges with the district court as a discretionary matter. The writ of injunction is a gracious writ which the court may issue or withhold. Certainly it is one which should be withheld under "facts involved in the instant matter."

[fol. 57] The point that unless the Commission stay its order it would necessitate the calling of two, instead of one, three-judge courts is without merit. In the first place, if interveners are to seek the aid of the courts, the case should be presented there in toto. In the second place, if one three-judge court should take jurisdiction, there is no reason why that court should not retain jurisdiction.

These interveners do not contend that the proposed merger is not in the public interest. Mr. McFarland, in his letter to the Commission of May 24th, offers to diligently undertake a forward court review "in order that the merger agreement may be carried at the earliest practicable time." These interveners expect and desire the merger to be consummated, but they seek a price for their stock over and beyond the exchange terms which were acceptable to the great majority of shareholders and which were found by the Commission to be just and reasonable. If interveners are right in that for which they have been contending in all of their submissions, to the Commission and in Mr. McFarland's letter, the consummation of the merger is a condition precedent to any atisfaction of their claims.

Should there be no further postponement of the effective date of the order approving the merger, applicants have planned to consummate the merger not later than June 5, 1947. Pere Marquette's stockholders then would partici-

pate in the dividends which have been declared on Chesapeake and Ohio common stock payable July 1, 1947, to stockholders of record June 6, 1947. It is respectfully submitted that holders of only 2100 shares of Pere Marquette stock out of a total of 686,750 shares outstanding should not be permitted to delay the merger further and thus deprive the vast majority of Pere Marquette stockholders of the benefits that will flow to them from the consummation of the merger.

It is submitted that if this Commission should accede to the extraordinary proposal of Mr. McFarland that it grant a stay and thus decide what would be a discretionary matter for the three-judge court, it would have a most discouraging significance to the great majority of Pere Marquette stockholders who want the merger to be consummated at an early date.

In behalf of the applicants and the vast majority of the share holders and in behalf of the public which the Commission found would be advantaged by the merger, we respectfully urge that the Commission deny the request for a further postponement of the effective date of its order in this proceeding, thus permitting the merger to be consummated by June 5, 1947, and permitting applicants thereafter, and in accordance with their declaration to the Commission (applicants' Reply to Petition For Rehearing and Reconsideration, page 15), to institute appropriate appraisal proceedings in the Chancery Court of the City of Richmond, Virginia.

Yours very truly, /s/ John C. Shields, 6-206 General Motors Building, Detroit 2, Michigan; Geo. H. Gardner, 724 Transportation Building, Washington 6, D. C.

[fol. 58] Copies to:

Carl McFarland 1302 Eighteenth St., N.W. Washington 6, D. C. A. G. Berse 160 Fifth Avenue, New York 10, N. Y. Jacob Shapiro 225 Broadway, New York 7, N. Y. Samuel W. Savage 905 Baldwin Avenue, Norfolk 7, Virginia. E. J. Brennan 418 Olive Street, St. Louis, Missouri. C. M. Mulholland 741 Nicholas Building, Toledo, Ohio. R. W. Purcell 3600 Terminal Tower, Cleveland 1, Ohio. J. C. Kauffman 3016 Terminal Tower, Cleveland 1, Ohio. Glenn C. Wilber 6206 General Motors Building, Detroit 2, Michigan.

[fol. 59] IN UNITED STATES DISTRICT COURT

ORDER CONVENING THREE-JUDGE COURT—Entered and Filed June 2nd, 1947

[Title omitted]

A verified complaint by the plaintiffs having been filed herein for an order annulling and suspending the enforcement and setting aside the Decision and Order of the Interstate Commerce Commission Finance Docket No. 15228, dated April 1, 1947, issued by the defendant, Interstate Commerce Commission, and praying further that, pending final determination of the complaint, a temporary stay or suspension of the Commision's Order should be issued and entered;

It is hereby ordered that said complaint be heard on the 4th day of June, 1947, at 2:30 o'clock P. M. Eastern Standard Time before Circuit Judge Armstead M. Dobie and District Judges Alfred D. Barksdale and Sterling Hutcheson.

It is further ordered that this order and complaint be served on the United States of America and the Interstate Commerce Commission by filing a copy thereof and a copy of the complaint with the Secretary of the Interstate Commerce Commission and the Department of Justice.

It is further ordered that, pending final determination of said complaint, the defendants show cause on the 4th day of [fol. 60] June, 1947, before this Court in the City of Alexandria, Virginia, at 2:30 o'clock in the afternoon, Eastern Standard Time, why a temporary stay or suspension of the Commission's Order should not be issued forthwith enjoining the enforcement of said Order issued by the defendant, Interstate Commerce Commission.

Dated this 2nd day of June, 1947.

(S.) Sterling Hutcheson, United States District Judge.

[fol. 61] The Chesapeake and Ohio Railway Company

Annual Meeting of Stockholders to Be Held April 23, 1946

Proxy Statement and Agreement of Merger of Pere Marquette Railway Company Into The Chesapeake and Ohio Railway Company

[fol. 62] The Chesapeake and Ohio Railway Company

Proxy Statement

Annual Meeting of Stockholders April 23, 1946

This proxy statement is being furnished to the stockholders of The Chesapeake and Ohio Railway Company (hereinafter generally called either "Chesapeake" or the "Company") in connection with the enclosed form of proxy for the annual meeting of stockholders to be held on April 23, 1946, or any adjournment thereof, notice of which is also enclosed herewith.

The following matters will be considered at the meeting:

(1) The election of directors;

(2) The adoption and sanction of the Agreement of Merger dated February 19, 1946, providing for the merger of Pere Marquette Railway Company into The Chesapeake and Ohio Railway Company, a copy of which is annexed as Exhibit A to this Proxy Statement, and the adoption of resolutions authorizing the Board of Directors and officers of the Company to take all necessary or appropriate action to carry out the terms of said Agreement of Merger and the merger therein provided for, including compliance with any conditions that may be lawfully imposed by any regulatory body, and the exercise of the authority contemplated by Article VIII of said Agreement to consummate said merger in the absence of votes or assents in the percentages specified therein or to terminate said Agreement;

(3) Such other matters as may properly come before the meeting.

Any proxy given pursuant to this solicitation may be revoked by the person executing it at any time prior to the actual exercise of the powers conferred by such proxy. The proxy herein sought is being solicited on behalf of the management of the Company by authority of its Board of Directors. The cost of this solicitation is being paid by the Company.

It is contemplated that additional solicitation will be made by personal interview, telephone, and telegraph, under the direction of William A. Kissel, 30 Broad Street, New York, N. Y., by not more than 25 specially engaged persons at an

anticipated aggregate cost of $7,000, which will be paid by the Company.

Matters Relating to Election of Directors

Fourteen directors are to be elected. The proxy herein solicited is to be voted for the election as directors of the nominees hereinafter named, and in the event of the death or inability to act of any of the nominees, the proxy committee for the management is authorized to substitute another nominee.

The record date for the annual meeting is March 25, 1946.

Voting Securities and Ownership Thereof

There are outstanding 7,657,354 shares of common stock of the Company of the par value of $25 each. As of March 1, 1946, these shares were held by 83,755 stockholders. No stockholder holds beneficially as much as 10% of the voting securities of the Company.

The Interstate Commerce Commission, under date of June 5, 1945, in Finance Docket No. 14692, approved and authorized control of the Company by Alleghany Corporation, through stock ownership. As of March 15, 1946, Alleghany Corporation beneficially owned 606,634 shares, or [fol. 63] approximately 7.92%, of the Common Stock of the Company. Alleghany Corporation is an associate of Robert R. Young, Allan P. Kirby, Robert W. Purcell, and Leonard P. Ayres, nominees hereinafter named, by reason of their respectively holding the offices of Chairman of the Board, President, Vice-President, and Vice-President, of that Corporation, and is an associate of Mr. Kirby by reason, additionally, of his beneficial ownership of more than 10% of the Common Stock of Alleghany Corporation. Messrs. Young, Kirby and Ayres are directors of Alleghany Corporation. As of March 15, 1946, Mr. Kirby beneficially owned 39,158 shares of Series A Preferred Stock and 500,000 shares of Common Stock of Alleghany Corporation, representing, respectively, 5.87% and 10.95% of the voting power of each such class of stock. As of the same date, Mr. Young beneficially owned 6,200 shares of Prior Preferred Stock, 5,983 shares of Series A Preferred Stock, and 47,106 shares of Common Stock, of Alleghany Corporation, representing, respectively, 5.80%, .90% and 1.03% of the voting power of each such class of stock. The holders of Common Stock

of Alleghany Corporation have one vote for each share. The holders of Prior Preferred Stock, as a class, have the right to elect two directors. The holders of Series A Preferred Stock, as a class, have the right to elect two directors when dividends are in default on this class of stock, as is the case at the present time.

[fol. 64] The Nominees for the Board of Directors

The following information (which, except so far as it is within the knowledge of the Company, has been obtained from the nominees named below) is furnished concerning the nominees, all of whom have been nominated by the Board of Directors:

Name	Principal Occupation	First Became Director in	Common Stock(1) Beneficially Owned as of March 15, 1946	Aggregate Remuneration in 1945(2)	Increase over 1944
Leonard P. Ayres, Cleveland, Ohio	Economic Advisor to the Company and Vice-President, The Cleveland Trust Company	1942	400	$22,500.00(3)	$4,700.00
James G. Blaine, New York, N. Y.	President, The Marine Midland Trust Company of New York	1940	10	$ 1,600.00	$ 200.00(D)
Robert J. Bowman, Detroit, Mich.	President, Pere Marquette Railway Company	1946	151	$51,906.66(4)	$1,276.66
Cyrus S. Eaton Cleveland, Ohio	Chairman of the Board, Steep Rock Iron Mines, Ltd.	1943	100	$ 1,700.00	$ 100.00(D)
Howell B. Erminger, Jr., Chicago, Illinois	President, Miami Corporation	1927	200	$ 2,300.00	$1,170.00(D)
Herbert Fitzpatrick, Huntington, W. Va.	Partner, Fitzpatrick, Strickling & Marshall	1930	116	$ 2,100.00(5)	$ 200.00
Harvey D. Gibson, New York, N. Y.	President, Manufacturers Trust Company	1940(6)	100	$ 300.00	$ 300.00
Henry J. Guild, Adams, Mass.	President, Brightwater Paper Company	1943	5	$ 2,200.00	$ 100.00
Allan P. Kirby, Morristown, N. J.	Management of personal affairs; President of Alleghany Corporation	1942	100(7)	$ 2,000.00	$ 100.00(D)
Wm. H. Lipscomb, Leesburg, Va.	Real Estate	1942	100	$ 1,970.00	$ 170.00(D)
Robert W. Purcell, Cleveland, Ohio	Vice-President & General Counsel of the Company and The New York, Chicago and St. Louis Railroad Company	1946	10	$30,000.00(8)	$8,680.00
Harry C. Thompson, New York, N. Y.	Vice-President, The Continental Bank & Trust Company of New York	1940	10	$ 3,500.00	$1,400.00
Andrew Van Pelt, Philadelphia, Pa.	Insurance and Real Estate Management	1943	250	$ 2,100.00	$ 200.00
Robert R. Young, Newport, R. I.	Chairman of the Board of the Company and of Alleghany Corporation	1937	110	$ 9,300.00(9)	$ 340.00(D)

(D) Decrease.

(1) Of the Company. No nominee owns any other class of securities of the Company.

(2) Consisting, except as noted below, entirely of directors' and committeemen's fees from the Company and subsidiaries.

(3) Includes $20,500 received as salary from the Company and subsidiaries.

(4) Consists of $50,000 received as salary from Pere Marquette Railway Company, $966.66 received as salary from Manistee and Northeastern Railway Company from September 5, 1945, and $940 received as directors fees from Pere Marquette, Railway Company and its subsidiaries.

(5) Mr. Fitzpatrick receives a pension from the Company in the amount of $18,000 per annum. Mr. Fitzpatrick's firm is engaged in the general practice of law, which includes its representation of the Company as State Counsel in West Virginia, for which service it was paid in 1945 the sum of $17,000. In addition, the Company paid Mr. Fitzpatrick's firm during 1945 the sum of $15,000 for special legal services and Western Pocahontas Corporation, a wholly-owned subsidiary of the Company, paid said firm the sum of $3,000 for legal services.

(6) Mr. Gibson was originally elected in 1940. Owing to his engagement with the American Red Cross as Commissioner to Great Britain, he ceased to act as director in August, 1942, and was not a nominee for reelection at the 1943 annual meeting of stockholders. He was reelected to the Board on June 19, 1945.

(7) In addition, Mr. Kirby has a substantial interest in two personal holding companies owning 7,600 shares of the Common Stock of the Company.

(8) Consists of salary received from the Company and its subsidiaries.

(9) Includes $7,500 received as salary from the Company.

[fol. 65] The above-mentioned nominees, if elected, will serve until the next annual meeting of the stockholders and until their successors shall have been elected and shall have qualified. The said nominees have been designated in the Agreement of Merger as directors of the continuing corporation.

All of the above-mentioned nominees have been previously elected directors by the stockholders of the Company, with the exception of Messrs. Bowman and Purcell, who were elected to fill existing vacancies at the meeting of the Board held February 19, 1946.

Robert J. Bowman was elected President of Pere Marquette Railway Company on December 15, 1942, and has since served as President and director of that company, as well as President and director of various subsidiary companies and director of several affiliated railway companies. Prior to December 15, 1942, he was Vice-President in charge of operation and maintenance of Pere Marquette Railway Company.

Robert W. Purcell has, since 1943, been successively Acting General Counsel, General Counsel, and Vice-President and General Counsel of the Company and The New York, Chicago and St. Louis Railroad Company. He is also a Vice-President of Alleghany Corporation and Chairman of the Board of Pathe Industries, Inc. Within the past five years, he has engaged in the general practice of law and has held legal and official positions in various corporations.

Interest of Nominees and Their Associates in Transactions During the Past Year or in Proposed Transactions

The Cleveland Trust Company, an associate of Leonard P. Ayres, is Trustee under two Equipment Trusts of the Company.

The Marine Midland Trust Company of New York, an associate of James [illegible] Blaine, is Trustee under the First Mortgage of The Fort Street Union Depot Company, a subsidiary of Pere Marquette Railway Company.

Manufacturers Trust Company, of New York, an associate of Harvey D. Gibson, is Trustee under two Equipment Trusts of the Company, and is to be Trustee under another Equipment Trust of the Company to be issued during the first half of 1946.

The Continental Bank & Trust Company of New York, an associate of Harry C. Thompson, is Trustee under an Equipment Trust of Pere Marquette Railway Company and an Equipment Trust of The New York, Chicago and St. Louis Railroad Company, subsidiaries of the Company, and is to be Trustee under an Equipment Trust of the Company to be issued during the first half of 1946; and during the past year also acted as depositary and agent in connection with the distribution by the Company to its stockholders of shares of common stock of The Pittston Company.

Remuneration of Officers, Directors, and Others

Information as to the aggregate remuneration received during the past fiscal year by the above-mentioned nominees from the Company and its subsidiaries is given above. The following information is furnished for the same period with respect to the remuneration from the Company and its subsidiaries of each other person who acted as director during said period, and each other person who acted as an officer but not as a director and who received remuneration totaling more than $20,000 during the year:

[fol. 66]

Name	Title	Aggregate Remuneration in 1945	Increse over 1944
L. B. Allen	Vice-President	$24,227.09	$5,627.09
H. P. Henshaw	Vice-President	$32,562.50	$5,052.50
W. C. Hull	Vice-President	$33,375.00	$3,375.00
H. F. Lohmeyer	Secretary and Treasurer	$23,420.00	$3,305.00
A. T. Lowmaster	Executive Vice-President	$50,180.00	.....
R. S. Marshall	Senior Vice-President	$43,970.00	$ 350.00
C. E. Newton	President	$77,620.00	$ 960.00
J. B. Parrish	Vice-President	$30,875.00	$3,375.00
J. P. Routh	Director to June 8, 1945	$ 440.00	$1,540.00(D)
E. M. Thomas	Vice-President	$33,150.00	$2,465.00
W. J. Tuohy	Vice-President	$30,069.00	$4,405.00
W. H. Wenneman	Vice-President	$25,420.00	$1,412.15

(D) Decrease.

During the past fiscal year the Company did not have in operation any formal pension or retirement plan, although a number of pensions were granted by the Board of Directors and paid pursuant to a pension policy in effect for some years past. This policy does not contemplate the setting aside of any funds for pensions, and none were so set aside. Herbert Fitzpatrick, retired Chairman of the Board, received a pension of $18,000. No officer receiving remuneration of more than $20,000 during the past fiscal year received a pension.

No officer, director, or nominee was indebted to the Company during the past fiscal year.

The total remuneration received from the Company and its subsidiaries by all the officers and directors as a group was $502,509.59 in 1945, as compared with $419,757.85 in 1944. During the past fiscal year there were six employees of the Company and its subsidiaries, other than officers and directors, who received from the Company and its subsidiaries remuneration in excess of $20,000 but not more than $50,000. The aggregate remuneration of these six employees was $144,190.00. There were two persons, other than officers and directors of the Company, who received from subsidiaries of the Company remuneration in excess of $50,000 per annum, but not more than $100,000 per annum, namely, the Presidents of The New York, Chicago and St. Louis Railroad Company and Pere Marquette Railway Company. The aggregate remuneration of these two persons was $102,806.66.

The following persons, other than officers, directors, or employees, received aggregate remuneration from the Company in excess of $20,000 in the capacities stated:

Name	Aggregate Remuneration	Capacity in Which Received
The Continental Bank & Trust Company of New York, New York, N. Y.	$ 44,646.80	Services as depositary of stock of The Pittston Company distributed by the Company as an extra dividend July 2, 1945, and as agent for the purchases and sales of fractional receipts for such stock.
Donovan, Leisure, Newton & Lumbard, New York, N. Y.	$ 22,500.00	Legal Services.
Garfield, Harris, Robison & Schafer, Cleveland, Ohio	$ 23,142.00	Architectural and Engineering Services.
James D. Miller and Company, New York, N. Y.	$ 21,500.00	Accounting Services.
J. P. Morgan & Co. Inc., New York, N. Y.	$104,933.12	Services as transfer agent and fiscal agent.
Thompson, Hine & Flory, Cleveland, Ohio	$ 26,750.00	Legal Services.

[fol. 67] Matters Relating To the Merger of Pere Marquette Railway Company Into the Chesapeake and Ohio Railway Company

An Agreement of Merger was executed by the Boards of Directors of Chesapeake and Pere Marquette Railway Company (hereinafter generally called "Pere Marquette"), and by said companies as well, on February 19, 1946. The

Agreement provides for the merger of Pere Marquette into Chesapeake, which is to continue as a corporation of the Commonwealth of Virginia.

The Boards of Directors of the two companies, after careful consideration of the matter, have determined that the merger will result in greater efficiency and economy of operation, management, and financing, and will be in the public interest. The principal savings will consist of (1) reduction in administrative and office expenses by having one administrative organization only, instead of two such organizations, (2) savings in accounting for division of revenues, equipment rents, and other joint expenses, (3) reduction in the number of reports made to Federal and State regulatory bodies, (4) savings from consolidation of off-line traffic offices, and (5) savings in interest charges resulting from the anticipated refunding of bonded indebtedness. The amount of the economies expected to be derived from the foregoing and from such other changes in operation as may be feasible is estimated to be approximately $500,000 per annum within five years from the effective date of the proposed merger. While Chesapeake and Pere Marquette have been separately operated up to the present time, there has been close collaboration between the two roads through joint officers and otherwise since Chesapeake acquired control of Pere Marquette by stock ownership in 1929.

Upon consummation of the merger, the Company will qualify to do business in the State of Michigan and in all other jurisdictions in which Pere Marquette is qualified to do business. It will operate lines of railroad in the United States and Canada aggregating approximately 5,000 miles. A map showing the lines of railroad operated by each of the companies is annexed hereto as Exhibit B.

Action to Be Taken at Meeting

The Agreement of Merger is subject to the approval of the stockholders of both Chesapeake and Pere Marquette and will be considered at the annual meetings of those companies to be held on April 23, and May 7, 1946, respectively. The merger is also subject to authorization and approval by the Interstate Commerce Commission. Application for such authorization and approval has been made to the Interstate Commerce Commission, and said applica-

tion is set for hearing at Washington, D. C., on Wednesday, April 24, 1946, at 9:30 o'clock a. m.

At the meeting of the stockholders of this Company, resolutions will be submitted for adoption by the stockholders adopting and sanctioning the Agreement of Merger and authorizing the Board of Directors and officers of the Company to take all necessary or appropriate action to carry out the terms of the Agreement of Merger and the merger therein provided for, including compliance with any conditions that may be lawfully imposed by any regulatory body, and the exercise of the authority contemplated by Article VIII of the Agreement of Merger to consummate said merger in the absence of votes or assents in the percentages specified therein, or to terminate said Agreement.

The proxy herein solicited is to be voted for the adoption of said resolutions, unless otherwise directed.

You are urged to read the Agreement of Merger in its entirety. For your convenience, a summary of its principal provisions is set forth below.

Bases of Conversion of Pere Marquette Stock

Chesapeake has outstanding 7,657,354 shares of Common Stock, which will not be disturbed in this transaction.

[fol. 68] Pere Marquette, a Michigan corporation, has outstanding 111,999 shares of 5% Cumulative Prior Preference Stock, 124,288 shares of 5% Cumulative Preferred Stock (of which Chesapeake owns 13,950 shares), and 450,448 shares of Common Stock (of which Chesapeake owns 313,900 shares).

Upon consummation of the merger, Chesapeake will take over all of the assets and assume all of the obligations and liabilities of Pere Marquette, and will issue its 3½% Convertible Preferred Stock and Common Stock in exchange for stocks of Pere Marquette on the following bases:

One share of 3½% Convertible Preferred Stock and ⅓ of one share of Common Stock for each share of 5% Cumulative Prior Preference Stock of Pere Marquette (including all accrued and unpaid dividends thereon as of the Merger Date);

Eight-tenths of one share of 3½% Convertible Preferred Stock and 4/10 of one share of Common Stock for each share of 5% Cumulative Preferred Stock of Pere Marquette (including all accrued and unpaid

dividends thereon as of the Merger Date); and

One-half of one share of Common Stock for each share of Common Stock of Pere Marquette.

The Agreement of Merger provides that shares of Chesapeake stock are to be issued in conversion of shares of Pere Marquette owned by Chesapeake and that such shares, after consummation of the merger, are to be held by Chesapeake in its treasury, subject to sale as hereinafter noted.

Scrip will be issued in lieu of fractional shares, exchangeable in appropriate amounts for full shares.

On February 1, 1946, the accrued and unpaid dividends on Pere Marquette Prior Preference Stock amounted to $36.25 per share, or an aggregate of $4,060,000, and the accrued and unpaid dividends on Pere Marquette Preferred Stock amounted to $72.50 per share, or an aggregate of $9,011,025. So long as dividends are in arrears on the Prior Preference Stock, no dividends may be paid on the Preferred Stock, and so long as any dividends are in arrears on the Preferred Stock, no dividends may be paid on the Common Stock.

The merger will dispose of these arrearages on the Prior Preference Stock and the Preferred Stock of Pere Marquette. Under the terms of the Agreement of Merger, the Prior Preference Stock and the Preferred Stock, including all accrued and unpaid dividends on both classes as of the Merger Date, and the Pere Marquette Common Stock, will be exchangeable for shares of Chesapeake stock, upon which dividends will be payable out of the earnings or surplus of the continuing corporation when and as declared by its Board of Directors.

There are attached hereto as Exhibits C-12 and C-13, tabulations showing the capitalization of each of the roads, including the amount of long term funded debt, and Exhibit C-17 showing the class and aggregate amount of securities of Chesapeake which will be issued to the holders of each of the three classes of Pere Marquette stock.

The following tabulation taken from Exhibits C-7, C-8, and C-9 shows (a) for Chesapeake, (b) for Pere Marquette, and (c) on a consolidated basis for the continuing corporation, for the period 1930 to 1945, inclusive, the following: (1) operating revenues, (2) net income as reported, (3) net income adjusted by substituting interest on debt outstanding December 31, 1945, for interest on debt

as reported in the respective years, diminished by the increased amount of taxes on income which would have resulted from the reduced interest charges and (as to the continuing corporation) by eliminating intercompany dividends and the resultant taxes, (4) dividend requirements of the preferred stocks of Pere Marquette and of the continuing corporation, and the balances of adjusted net income available for each class of stock, and (5) per share computation of earnings on common stock on the adjusted earnings basis:

[fol. 69]

The Chesapeake and Ohio Railway Company
(000's omitted except in last column)

Year	Operating Revenues	Net Income as Reported	Adjusted Net Income	Dividend Requirements—Prior Preference Stock	Balance for Preferred and Common Stock	Dividend Requirements—Preferred Stock	Balance for Common Stock	Adjusted Net Income per Share of Common
1930	$131,588	$34,145	$36,962	—	—	—	$36,962	$4.83
1931	119,540	26,696	29,885	—	—	—	29,885	3.90
1932	98,709	23,528	26,449	—	—	—	26,449	3.45
1933	105,953	28,240	30,896	—	—	—	30,896	4.03
1934	109,475	28,062	30,447	—	—	—	30,447	3.98
1935	114,025	31,040	33,451	—	—	—	33,451	4.37
1936	135,538	43,791	46,578	—	—	—	46,578	6.08
1937	127,347	34,563	36,623	—	—	—	36,623	4.78
1938	106,376	20,682	22,448	—	—	—	22,448	2.93
1939	118,722	27,343	28,933	—	—	—	28,933	3.78
1940	132,720	33,591	34,263	—	—	—	34,263	4.47
1941	150,237	44,940	45,300	—	—	—	45,300	5.92
1942	181,810	33,154	33,263	—	—	—	33,263	4.34
1943	208,512	31,359	31,431	—	—	—	31,431	4.10
1944	216,536	27,340	27,359	—	—	—	27,359	3.57
1945	203,332	16,380	16,429	—	—	—	16,429	2.15

Pere Marquette Railway Company
(000's omitted except in last column)

1930	$ 37,206	$ 2,015	$ 2,986	$560	$2,426	$621	$ 1,805	$4.00
1931	27,338	d 1,863	d 108	560	d 668	621	d 1,289	d2.86
1932	21,435	d 3,045	d 1,252	560	d1,812	621	d 2,433	d5.40
1933	21,934	d 1,599	109	560	d 451	621	d 1,072	d2.38
1934	24,591	d 611	1,005	560	445	621	d 176	d .39
1935	28,470	1,634	2,976	560	2,416	621	1,795	3.98
1936	32,459	2,758	3,793	560	3,233	621	2,612	5.80
1937	32,229	1,669	2,728	560	2,168	621	1,547	3.43
1938	25,445	d 2,259	d 808	560	d1,368	621	d 1,989	d4.42
1939	30,233	329	1,587	560	1,027	621	406	.90

[fol. 69]

The Chesapeake and Ohio Railway Company
(000's omitted except in last column)

Year	Operating Revenues	Net Income as Reported	Adjusted Net Income	Dividend Requirements—Prior Preference Stock	Balance for Preferred and Common Stock	Dividend Requirements—Preferred Stock	Balance for Common Stock	Adjusted Net Income per Share of Common
1940	33,007	1,253	2,300	560	1,740	621	1,119	2.48
1941	39,048	3,237	4,193	560	3,633	621	3,012	6.69
1942	44,311	3,571	4,413	560	3,853	621	3,232	7.18
1943	55,053	3,620	3,753	560	3,193	621	2,572	5.71
1944	56,303	3,012	3,366	560	2,806	621	2,185	4.85
1945	51,501	2,139	2,482	560	1,922	621	1,301	2.89

d—deficit.

[fol. 70]

Consolidated

The Chesapeake and Ohio Railway Company

Pere Marquette Railway Company
(000's omitted except in last column)

1930	$168,794	$36,160	$38,256	$—	$—	$701	$37,555	$4.81
1931	146,878	24,833	29,349	—	—	701	28,648	3.67
1932	120,144	20,483	25,197	—	—	701	24,496	3.14
1933	127,887	26,641	31,005	—	—	701	30,304	3.88
1934	134,066	27,451	31,452	—	—	701	30,751	3.94
1935	142,495	32,674	36,428	—	—	701	35,727	4.58
1936	167,997	46,549	50,312	—	—	701	49,611	6.35
1937	159,576	36,232	39,418	—	—	701	38,717	4.96
1938	131,821	18,423	21,640	—	—	701	20,939	2.68
1939	148,955	27,672	30,520	—	—	701	29,819	3.82
1940	165,727	34,844	36,563	—	—	701	35,862	4.59
1941	189,285	48,177	49,493	—	—	701	48,792	6.25
1942	226,121	36,724	37,675	—	—	701	36,974	4.73
1943	263,565	34,979	35,010	—	—	701	34,309	4.39
1944	272,839	30,352	30,735	—	—	701	30,034	3.85
1945	254,833	18,519	18,911	—	—	701	18,210	2.33



[fol. 71] Amount of Capital Stock Upon Consummation of Merger

The shares of Chesapeake Common Stock issuable in accordance with the Agreement of Merger will be part of a total of 12,000,000 shares of authorized Common Stock of the par value of $25 each, and the shares of 3½% Convertible Preferred Stock thus to be issued will be part of a total issue of 650,000 shares of Preferred Stock of the par value of $100 each authorized under the Agreement of Merger.

Giving effect to the issuance of 3½% Convertible Preferred Stock and Common Stock of Chesapeake in exchange for all Pere Marquette shares, including shares owned by Chesapeake, the capital stock of Chesapeake, disregarding fractions of shares, will be:

	Shares of Preferred	Shares of Common
Outstanding with public	200,269(a)	7,807,096
Held in treasury	11,160(a)	162,531
Initially reserved for conversion of 3½% Convertible Preferred Stock	—	338,287
Unissued	438,571	3,692,086
Totals	650,000	12,000,000

(a) 3½% Convertible Preferred Stock

The remaining 438,571 shares of authorized but unissued Preferred Stock and the remaining 3,692,086 shares of authorized but unissued Common Stock, and all shares of Preferred Stock and Common Stock at any time held in the treasury of the Company, including any shares of either class issuable in conversion of shares of Pere Marquette owned by Chesapeake, and any such shares becoming available by reason of dissent from the merger, may be sold by the Company at such time or times and for such price or prices as the Board of Directors may determine, without further approval of the stockholders, subject to any necessary authorization by regulatory bodies. There is no present intention to issue any of such shares (other than shares becoming available by reason of dissent from the merger), but they will be available for issuance in connection with any program of expansion, unification, or refinancing, or for any other proper corporate purpose.

The 38,571 shares of authorized but unissued Preferred Stock may be issued with such cumulative dividend rates, redemption prices, and liquidation prices as the Board of Directors may fix at the time of issuance, and the Board may also determine whether or not such stock shall be convertible into Common Stock, and if so, at what price, and whether it shall have the benefit of any retirement or sinking fund in addition to the Retirement Fund hereinafter described. No shares of Preferred Stock in addition to the 650,000 shares described may be authorized except with the approval of the holders of at least two-thirds of all shares of Preferred Stock then outstanding.

Terms of 3½% Convertible Preferred Stock

The shares of 3½% Convertible Preferred Stock issuable to holders of Prior Preference and Preferred Stock of Pere Marquette will, as previously stated, be part of a total issue of 650,000 shares of Preferred Stock of the par value of $100 each authorized by the Agreement of Merger. Dividends on the 3½% Convertible Preferred Stock will be cumulative at the rate of 3½% per annum from the date upon which the merger becomes effective, such dividends being payable quarterly on the first days of February, May, August, and November.

Each share of the 3½% Convertible Preferred Stock will initially be convertible into 1.6 shares of Common Stock, the initial conversion price of the Common Stock being $62.50 per share. Provision is made for adjustment (but only in multiples of 1/40th of a share) in the number of shares of Common Stock deliverable upon conversion in the event the Common Stock shall be combined into a less number of shares or subdivided into a greater number of shares; or in the event additional Common Stock shall at any time be issued for a consideration less than the conversion price [fol. 72] then in effect, or shall be issued as a stock dividend or otherwise without consideration. The issuance of securities convertible into Common Stock, or of rights, warrants, or options to purchase Common Stock, will be treated as an issuance of Common Stock, in the total maximum number of shares necessary to permit conversion or exchange of such convertible securities, or the exercise of such rights, warrants, or options; and the amount received or receivable by the Company as consideration for the issue of such

convertible securities, rights, warrants, or options, plus the minimum aggregate amount, if any, payable to the Company upon conversion, exchange, or exercise thereof, shall be deemed to be the consideration actually received for such Common Stock. In computing adjustments in the conversion ratio, shares of Common Stock held in the treasury of the Company will be deemed to be outstanding shares. No adjustment of the conversion ratio will, however, be made on account of any of the following issues of Common Stock: (a) shares issued or issuable in conversion of shares of Pere Marquette, (b) shares issued upon conversion of any securities having conversion rights into Common Stock, and (c) shares theretofore acquired by the Company and held in its treasury. Additional provisions deal with the conversion rights in the case of a reclassification or other adjustment of the capital stock of the Company and in the case of a subsequent consolidation or a merger involving the Company.

The 3½% Convertible Preferred Stock will, at the option of the Company, be redeemable, in whole or in part, upon at least 30 days notice, at $105 per share plus dividends accrued or in arrears. The redemption date will not be earlier than November 1, 1950, and thereafter will be only a dividend payment date, although a call for redemption may be issued at any time prior to November 1, 1950.

If, upon issuing a call for redemption of all of the outstanding shares of 3½% Convertible Preferred Stock, the Company shall deposit in trust the funds necessary for redemption, including dividends to the redemption date, and shall also deposit in trust the number of shares of its Common Stock necessary to convert all of its outstanding 3½% Convertible Preferred Stock, such stock shall no longer be deemed to be outstanding for any purpose, and each holder of such stock shall, thereafter, have only the right to receive, at his election, either the redemption price of his shares, including unpaid dividends to the redemption date, or the number of shares of Common Stock into which his Preferred Stock is convertible. Until an election is made, the depositary will distribute to each holder, on the regular dividend payment dates, an amount equal to dividends at the rate of 3½% per annum out of the deposited funds.

In the opinion of counsel for the Company, the deposit of funds for redemption of the 3½% Convertible Preferred

Stock, pursuant to the provisions of the Agreement of Merger summarized in the preceding paragraph, would not constitute a closed transaction resulting in the realization of gain or loss to the stockholders at that time.

In the event of voluntary liquidation or dissolution, the 3½% Convertible Preferred Stock will be entitled to $105 per share plus dividends accrued or in arrears, and, in the event of involuntary liquidation or dissolution, to $100 per share plus such dividends. A merger of the Company into any other corporation, or merger of any other corporation into the Company, or consolidation of the Company with any other corporation, or a sale or transfer of the property of the Company as or substantially as an entirety will not be deemed to be a liquidation, dissolution, or winding up of the Company.

Within 30 days after the merger becomes effective, the Company is to set aside $250,000 as a Retirement Fund for the purchase of 3½% Convertible Perferred Stock and any other Preferred Stock that may be issued. So long as dividends on all outstanding Preferred Stock shall have been paid for all past dividend periods, the Company shall, on the first day of March in the year succeeding the first full calendar year after the merger has become effective, and on the first day of March in each year thereafter, set aside in the Retirement Fund a sum equal to 5% of its net income after fixed charges for the preceding calendar year less an amount equal to dividends payable during such year on all outstanding Preferred Stock and a dividend allowance [fol. 73] of $3.50 per share on the outstanding Common Stock, such sum in no event to be in excess of the amount necessary to bring the Retirement Fund up to $1,000,00. The Retirement Fund will be held by the Company, to be used on such occasions as the Board of Directors in its sole discretion may determine, for the purchase and cancellation of Preferred Stock of any series, at not more than the redemption price of the stock purchased. There is no affirmative requirement that monies in the Retirement Fund be used for the purchase of Preferred Stock, and if not so used, the amount set aside for the Retirement Fund would not exceed $1,000,000 in the aggregate.

Voting and Preemptive Rights

Preferred and Common Stock will vote as a single class, each share being entitled to one vote, except that, as noted above, the authorized Preferred Stock shall not be increased without the approval of at least two-thirds of all Preferred shares then outstanding.

Holders of Preferred Stock will have no preemptive rights to purchase any stock or other securities of the Company.

Holders of Common Stock will have preemptive rights to purchase, at such price as may be fixed by the Board of Directors, stock of any class which may be issued for cash, as well as any securities issued for cash that may be convertible into stock or that may be issued with stock purchase warrants attached, except shares acquired by the Company in conversion of shares of Pere Marquette owned by it, shares becoming available by reason of dissent from the merger, and any other shares at any time acquired or reacquired by the Company and held in its treasury, unless such rights shall have been waived by the vote of at least two-thirds of all of the shares of Common Stock then outstanding.

Miscellaneous Provisions of Agreement of Merger

The Company will have the right, unless payments to the Retirement Fund are in arrears, to purchase shares of its capital stock of any class, and may cancel such shares, or hold them as treasury stock, or resell them at such price as may be approved from time to time by the Board of Directors and authorized by the Interstate Commerce Commission. It shall not, however, purchase less than the whole of its outstanding Preferred Stock or any of its Common Stock if dividends on the Preferred Stock are in arrears for one or more calendar years, and it shall not purchase any of its Preferred Stock at a price in excess of the redemption price. Monies in the Retirement Fund may be applied to the purchase of Preferred Stock at any time.

The merger is not to become effective until the holders of at least 98% of the Common Stock of Chesapeake and at least 98% of each class of outstanding stock of Pere Marquette (excluding any shares held by Chesapeake) shall have voted for or irrevocably assented thereto, unless the

Boards of Directors of the two companies shall determine to proceed upon the votes or assents of smaller percentages. In the absence of the 98% vote or assent specified, the board of directors of either company may elect to abandon the merger, and thereupon the Agreement shall be terminated. It is the present intention of the Board of Directors of this Company to consummate the merger if it is approved by holders of shares of both companies sufficient to satisfy the statutory requirements of the States of Virginia and Michigan, unless the Board shall be of the opinion that, in view of all the circumstances, the merger is impracticable or undesirable. The Board does not expect to consummate the merger if, by reason of potential liability to stockholders who have dissented or may dissent therefrom, the Board deems it not to be in the best interests of the Company to proceed with the merger.

The by-laws of Chesapeake, as they shall exist at the effective date of the merger, except in so far as they may be inconsistent with the Agreement of Merger, shall continue to be the by-laws of the Company.

[fol. 74] The Agreement of Merger contains many other provisions with respect to the carrying out of the merger, the rights of the stockholders, and the administration of the affairs of the Company after the consummation of the merger.

Requirements for Consummation of the Merger

Section 3822 of the Code of Virginia of 1919, as amended, requires that an agreement of merger shall be adopted by a majority of all of the votes cast at the meeting of stockholders. Section 22.233 of Michigan Statutes Annotated provides that an agreement of merger must be sanctioned by a majority vote of the stockholders of each class of stock having voting powers. As previously stated, authorization and approval of the Interstate Commerce Commission is also required, and the consummation of the merger is further subject to conditions prescribed in the Agreement of Merger.

After thorough study and consideration, your Board of Directors has concluded that the merger is in the best interests of the stockholders of this Company and recommends approval of the Agreement of Merger and the merger provided for therein.

Statutory Rights of Dissatisfied Stockholders

Sections 3822-a and 3822-b of the Code of Virginia of 1919, as amended, which provide a remedy for dissatisfied stockholders, are set forth in full as Exhibit D, attached hereto. The statutes of Michigan contain no provision dealing with this subject.

Financial Statements, Record of Dividends, and Market Prices

Attention is called to the financial statements of Chesapeake and Pere Marquette annexed hereto as Exhibits C-1 to C-15, inclusive, and C-16. Included in these financial statements are schedules of securities owned by Chesapeake and Pere Marquette. It will be noted that Chesapeake's principal investments in securities of other carriers are in Pere Marquette, The New York, Chicago and St. Louis Railroad Company (Nickel Plate), and The Wheeling and Lake Erie Railway Company. A proposal made by Chesapeake in August, 1945, for unification with Pere Marquette, Nickel Plate, and Wheeling was approved in September of that year by the Boards of Directors of the three roads last named, but the proposal was later withdrawn because Chesapeake was unwilling to meet the demands of a group of Nickel Plate Preferred Stockholders for better terms.

At the time this proposal was withdrawn, a new proposal, which is embodied in the Agreement of Merger, was made by Chesapeake to Pere Marquette.

On December 4, 1945, as a result of negotiations initiated by Nickel Plate, Chesapeake offered to sell to Nickel Plate its certificates of deposit for 78,145 shares of Wheeling and Lake Erie common stock at $70 per share, subject to authorization and approval by the Interstate Commerce Commission. Contingent on the purchase by Nickel Plate of the certificates of deposit representing the aforesaid common stock, Chesapeake has granted Nickel Plate an option to purchase on or before December 4, 1946, its certificates of deposit for 115,369 shares of Prior Lien Stock and 1,658 shares of Preferred Stock of Wheeling and Lake Erie at prices of $115 and $105 per share, respectively. The Company has no present plans for merging with Nickel Plate or Wheeling and Lake Erie, or for the purchase of additional securities of either company, but no representation is or can be made at this time regarding the possibility

of any unification with either of those companies or the acquisition of any additional securities of such companies.

Further financial statements of Chesapeake and Pere Marquette are on file at the office of the Interstate Commerce Commission, Washington, D. C., at the office of the Securities and Exchange Commission, Philadelphia, Pa., and at the office of the New York Stock Exchange. Further financial statements of Pere Marquette are also on file at the office of the Boston Stock Exchange.

[fol. 75] The annual report of the Company for the year ended December 31, 1945, will be mailed to all stockholders in the near future.

Regular dividends were paid quarterly on Pere Marquette Prior Preference Stock from the date of issuance in 1917, to August 1, 1931, inclusive. Dividends were paid intermittently from December, 1921, to August 1, 1931, on the Preferred Stock, covering all accumulations to August 1, 1931. Dividends were paid on the Common Stock at varying rates in each year from 1923 to 1931. Additional dividends paid on the Prior Preference Stock in 1936 and 1937 settled all accumulations to November 1, 1937. No further dividends were declared until 1945, during which year a total of $5 per share was declared on the Prior Preference Stock, settling all accumulations to November 1, 1938.

Chesapeake has paid dividends on its Common Stock in every year but one (1915) since 1898. Beginning October 1, 1940, the regular dividend rate has been 75¢ quarterly, or $3 per year. During this period, extra dividends have also been paid as follows: 1940, 62½¢; 1941-1944, 50¢ per share each year; and 1945, 1/40th share of common stock of The Pittston Company, which at its then market value was equivalent to 37¢ per share of Chesapeake Common Stock.

The high and low sale prices on the New York Stock Exchange of the Common Stock of Chesapeake, and of the Prior Preference, Preferred, and Common Stocks of Pere Marquette, for each quarterly period in the years 1944 and 1945, and monthly thereafter to March 15, 1946, are set forth in a schedule attached hereto marked Exhibit C-16.

Upon the consummation of the merger, application will forthwith be made by the Company to list on the New York Stock Exchange the shares of 3½% Convertible Preferred Stock and the additional shares of Common Stock of the Company to be issued upon consummation of the merger.

Securities of Chesapeake, Pere Marquette, and Alleghany

Corporation Beneficially Owned by the Officers and Directors of the Company and of Pere Marquette, and by their Associates.

A tabulation of the securities of Chesapeake, Pere Marquette, and Alleghany Corporation beneficially owned by the officers and directors of the Company and the officers and directors of Pere Marquette, and by the associates (as defined by the proxy rules of the Securities and Exchange Commission) of such officers and directors, as of March 15, 1946, is attached hereto as Exhibit C-18. The information therein contained, except so far as it is within the knowledge of the Company, has been obtained from the several persons named therein.

Other Matters Coming Before the Meeting

As of the date of this proxy statement, the management does not know of any matters to be presented at the annual meeting, other than the election of directors and the proposed merger of Pere Marquette into Chesapeake. If any other matters come before the meeting, it is intended that the holders of the proxies will vote thereon in their discretion. The annual report to stockholders and the minutes of the last preceding annual meeting of stockholders will be presented to the meeting for the purpose of being received and filed, and, if necessary, in the case of the minutes of the last meeting of the stockholders, corrected, but the action taken is not to constitute approval or disapproval of any of the matters referred to in said report or minutes.

By order of the Board of Directors.

H. F. Lohmeyer, Secretary.

March 15, 1946.

[fol. 76] Exhibit A

Agreement of Merger made and entered into this 19th day of February, 1946, by and between The Chesapeake and Ohio Railway Company, a corporation organized and existing under the laws of the Commonwealth of Virginia (the corporation which will survive, hereinafter called "Chesapeake" or the "Corporation"), and Pere Marquette Railway Company, a corporation organized and existing under the laws of the State of Michigan (hereinafter called "Pere Marquette"), such corporations being hereinafter

sometimes called "the parties hereto," and also by and between the respective Boards of Directors of each of the parties hereto:

Recitals

Chesapeake is a corporation owning lines of railroad in the States of Virginia, West Virginia, Kentucky, Ohio, and Indiana, and conducting a general railroad and transportation business in those States as well as in the State of Illinois and in the District of Columbia. Its authorized capital stock consists of $300,000,000 of common stock divided into 12,000,000 shares of the par value of $25 each, and preference stock up to an aggregate par amount which shall not, at the time of issuance, exceed 40% of the sum of the aggregate par amount of the total capital stock of Chesapeake (including the preference stock so issued) at such time outstanding and its then existing corporate surplus. There are presently outstanding 7,657,354 shares of common stock, and scrip in the aggregate amount of $69.44. One share of common stock is held in the treasury. No shares of preference stock are presently outstanding.

Pere Marquette is a corporation owning lines of railroad situated in the States of Michigan, Ohio, and Indiana, and conducting a general railroad and transportation business in those States as well as in the States of Illinois and New York and in the Province of Ontario, Canada. Its authorized capital stock is $77,684,200 divided into 776,842 shares of the par value of $100 each, consisting of 112,000 shares of prior preference stock, 124,290 shares of preferred stock, and 540,552 shares of common stock. There are presently outstanding 111,999 shares of prior preference stock, 124,288 shares of preferred stock, and 450,448 shares of common stock and scrip certificates representing fractional interests in prior preference, preferred, and common stock in the respective face amounts of $24, $16, and $71.95. Of such outstanding stock, certain shares of each class represent the number of shares required to redeem outstanding voting trust scrip certificates issued in a prior reorganization and securities of a predecessor company. There are presently held in the treasury one share of preferred stock, 11 shares of common stock, and voting trust scrip certificates representing fractional interests in prior preference, preferred, and common stock in the respective face amounts of $76, $84, and $28.05.

Chesapeake owns 313,900 shares of common stock and 13,950 shares of preferred stock of Pere Marquette.

Chesapeake and Pere Marquette are both organized for the purpose of carrying on the same or similar business, and the railroads owned by them form continuous or connecting lines of railroad.

The boards of directors of Chesapeake and Pere Marquette, after careful study of the matter, have determined that a merger of Pere Marquette into Chesapeake will result in greater efficiency and economy of operation, management, and financing, and will be in the public interest,

Now, Therefore, in consideration of the premises and of the mutual agreements, covenants, and provisions herein contained and for the purpose of prescribing the terms and conditions of such merger and the mode of carrying the same into effect, the parties hereto and the boards of directors thereof have agreed and do hereby agree as follows:

[fol. 77] Article I

Pere Marquette shall be, and is hereby, merged into Chesapeake, which, from and after the Merger Date (as defined in Article VIII hereof) shall continue to have the name of The Chesapeake and Ohio Railway Company.

Article II

The corporate identity and existence, and all and singular the property, real and personal, and estates and interests therein, leases, leasehold interests, agreements, contracts, debts due on whatever account things in action, name, undertakings, rights, powers, franchises, privileges, and immunities of Chesapeake shall continue in Chesapeake unaffected and unimpaired by this Agreement. The corporate existence of Pere Marquette shall continue in Chesapeake in so far as provided by law, but otherwise shall cease upon the Merger Date, and thereupon Chesapeake and Pere Marquette shall become a single corporation, namely, Chesapeake, which shall continue as a corporation of the Commonwealth of Virginia. Upon the Merger Date, all and singular the property, real and personal, and estates and interests therein, leases, leasehold interests, agreements, contracts, debts due on whatever account, things in action, name, undertakings, rights, powers, franchises, privileges, and immunities, owned, held or occupied by, or belonging to,

Pere Marquette shall be automatically conveyed, transferred, and set over to and vested in Chesapeake without any act or deed, and shall be as effectually the property of Chesapeake as they were of Pere Marquette.

Effective upon the Merger Date, Chesapeake hereby assumes and shall be responsible for, and thereafter shall promptly and punctually perform, all obligations, liabilities, duties, covenants, and conditions of Pere Marquette. Chesapeake shall have the right to make any and all defenses against all claims and demands arising out of such obligations, liabilities, duties, covenants, and conditions that Pere Marquette might have been entitled to assert in the premises. Nothing herein is intended to extend or enlarge the liens of any indenture, agreement, or other instrument executed by Pere Marquette or Chesapeake.

Article III

Chesapeake, in addition to the powers conferred upon it by the laws of the Commonwealth of Virginia, shall have the powers set forth in or conferred by the charter of Chesapeake and the charter of Pere Marquette, the latter conferring generally the power to conduct a railroad and transportation business, and matters incidental thereto, in the State of Michigan and other states, on the Great Lakes, and in the Dominion of Canada. The charter of Chesapeake, as changed or amended from and after the Merger Date by this Agreement, shall be, and continue to be, the charter of Chesapeake.

The principal office of Chesapeake in the Commonwealth of Virginia shall continue to be located in the City of Richmond, but offices may from time to time be established in such other cities within or outside the Commonwealth of Virginia as the board of directors may determine.

Article IV

Until amended or repealed as therein provided, the by-laws of Chesapeake, as they shall exist on the Merger Date, except in so far as they may be inconsistent with this Agreement, shall continue to be the by-laws of Chesapeake.

Article V

The board of directors of Chesapeake, who shall hold office from and after the Merger Date until their successors are elected or appointed and qualified in accordance with the by-laws, shall consist of 14 persons, whose names and respective places of residence are as follows:

[fol. 78]

Directors

Name	Place of Residence
Leonard P. Ayres	2061 East 96th Street, Cleveland, Ohio
James G. Blaine	40 East 54th Street, New York, N. Y.
Robert J. Bowman	1013 Audubon Road, Grosse Pointe Park 30, Michigan
Cyrus S. Eaton	Acadia Farm, Northfield, Ohio
Howell B. Erminger, Jr.	199 East Lake Shore Drive, Chicago, Illinois
Herbert Fitzpatrick	Huntington, W. Va.
Harvey D. Gibson	52 East 69th Street, New York, N. Y.
Henry J. Guild	19 Commercial Street, Adams, Mass.
Allan P. Kirby	Spring Valley Road, Morristown, N. J.
William H. Lipscomb	Raspberry Plains Farm, Leesburg, Va.
Robert W. Purcell	87 Beach Road, Lakewood, Ohio
Harry C. Thompson	23 Studio Lane, Bronxville, N. Y.
Andrew Van Pelt	Woodstock, Radnor, Pa.
Robert R. Young	Newport, R. I.

If any person above named shall be unable or unwilling to serve as a member of the board of directors, or if during the interim between the date of this Agreement and the Merger Date he shall cease to be a director of either Chesapeake or Pere Marquette, the remaining persons above named shall elect a successor to fill his place by majority vote.

The number of members of the board of directors may be changed from time to time in accordance with the provisions of the by-laws, but not to a number less than seven.

The names and places of residence of the principal officers of Chesapeake, who shall, from and after the Merger Date, hold office at the pleasure of the board of directors, or until

their successors are elected or appointed and qualified in accordance with the by-laws, are as follows:

Principal Officers

Office	Name	Place of Residence
Chairman of the Board	Robert R. Young	Newport, R. I.
President	Robert J. Towman	1013 Audubon Road, Grosse Pointe Park 30, Mich.
Executive Vice-President	Arch T. Lowmaster	3209 Hawthorne Avenue, Richmond, Virginia
Senior Vice-President	Ross S. Marshall	20776 Brantley Road, Shaker Heights, Ohio
Vice-President	William C. Hull	13415 Shaker Boulevard, Cleveland, Ohio
Vice-President	Edward M. Thomas	2885 Carlton Road, Shaker Heights, Ohio
[fol. 79]		
Vice-President	Walter J. Tuohy	13415 Shaker Boulevard, Cleveland, Ohio
Vice-President	Harry P. Henshaw	330 Woodland Drive, Huntington, W. Va.
Vice-President	John B. Parrish	6303 Towana Road, Richmond, Virginia
Vice-President	William H. Wenneman	2555 Coventry Road, Shaker Heights, Ohio
Vice-President	Leonard B. Allen	10807 Lake Avenue, Cleveland, Ohio
Vice-President	Robert W. Purcell	87 Beach Road, Lakewood, Ohio
Secretary and Treasurer	Henry F. Lohmeyer	18003 Fernway Road, Shaker Heights, Ohio

If during the interim between the date of this Agreement and the Merger Date any officer above named shall no longer hold office in either Chesapeake or Pere Marquette, the directors in this Article named shall by majority vote designate a person to be substituted in his place and stead.

The several departmental officers of Chesapeake and Pere Marquette on the Merger Date shall be continued, subject to the provisions of the by-laws, as departmental officers of Chesapeake, with such changes in titles and duties as their officers superior in rank or the board of directors may determine.

Article VI

The maximum number of authorized shares of the capital stock of the Corporation shall be 12,650,000, divided into two classes, Preferred Stock and Common Stock.

The total number of shares of the Preferred Stock authorized shall be 650,000 shares of the par value of $100 each, which may be issued in series as hereinafter provided.

The total number of shares of the Common Stock authorized shall be 12,000,000 shares of the par value of $25 each. The minimum number of shares of stock of the Corporation shall be 10 shares of Common Stock.

The description of said classes of stock, and the designations, rights, preferences, and voting powers of such classes of stock, or restrictions or qualifications thereof (together with certain related provisions for the regulation of the business and for the conduct of the affairs of the Corporation) shall be as hereinafter in Divisions A, B, and C of this Article VI set forth.

Division A—Preferred Stock

1. *Issuance in Series.* The board of directors is hereby empowered to cause the Preferred Stock of the Corporation to be issued in series with such of the variations permitted by clauses (a)-(f), both inclusive, of this Section 1 as shall have been determined by the board of directors with respect to any series prior to the issue of any shares of such series, subject, however, to the provisions of Sections 2-8, both inclusive, of this Division A, which shall apply to all series of the Preferred Stock of the Corporation, and to the provisions of Sections 9-11 of this Division A, which shall apply to the series of 3½% Convertible Preferred Stock created hereby.

The shares of the Preferred Stock of different series may vary as to:

(a) The designation of such series;

(b) The rate at which dividends are payable on the shares of such series (hereinafter referred to as the "dividend rate") and the dividend payment dates of the shares of such series;

[fol. 80] (c) The price or prices payable in respect of the shares of such series in case of the redemption thereof (hereinafter referred to as the "redemption price");

(d) The amount payable in respect of the shares of such series in case of liquidation, dissolution, or winding up of the Corporation (hereinafter referred to as the "liquidation price"), and the amount payable, if any, in addition to the liquidation price for such series

in case such action be voluntary (hereinafter referred to as the "liquidation premium");

(e) The amount of the retirement or sinking fund, if any, providing for the purchase or redemption of the shares of such series, in addition to the Retirement Fund provided for in Section 6 of this Division A; and

(f) The right, if any, to convert the shares of such series into shares of any other class or classes of stock or of any other series of the same class, and the rate or basis, time, manner, and conditions of conversion or the method by which the same shall be determined.

The shares of all series of Preferred Stock shall be equal in all respects except as, consistently with this Section 1, shall have been otherwise determined by the board of directors prior to the issuance thereof. All shares of Preferred Stock of each series shall be equal in all respects. If and whenever from time to time the board of directors shall determine to issue Preferred Stock of any other series not then established, it shall, prior to the issue of any shares of each such new series, cause provisions respecting the same to be set forth in the stock certificates therefor and in such other certificates, if any, as shall at the time be required by law.

2. *Dividends.* The holders of the Preferred Stock of each series shall be entitled to receive, if and when declared payable by the board of directors, dividends at, but not exceeding, the dividend rate for such series, payable on such dates as shall be fixed for such series. Such dividends shall be cumulative (but dividends in arrears shall not bear interest), and no dividends shall be declared or paid upon or set apart for the Common Stock unless and until full dividends on the outstanding Preferred Stock shall have been paid, or declared and set apart for payment, with respect to all past dividend periods and the current dividend period. Dividends on all shares of the Preferred Stock of each series shall commence to accrue and be cumulative from the date of the initial issue of any shares of such series; but (a) all dividends declared payable to the holders of record of Preferred Stock of any series as of a date on which shares of Preferred Stock of such series are owned by the Corpora-

tion shall be deemed to have been paid in respect of such shares owned by the Corporation on such date, and (b) in the event of the issuance of additional shares of Preferred Stock of any series subsequent to the date of the initial issuance of shares of such series, all dividends declared payable to the holders of record of Preferred Stock of such series as of a date prior to such additional issuance shall be deemed to have been paid in respect of the additional shares so issued. Current dividends shall not be paid or set apart for payment on the Preferred Stock of any series unless and until full dividends for all past dividend periods on the outstanding Preferred Stock of all series shall have been paid, or declared and set apart for payment; and if a default shall exist in the payment of dividends on all series of Preferred Stock, no dividends shall be declared on the Preferred Stock of any series unless dividends are declared on the Preferred Stock of all series then outstanding, in proportion to the aggregate amounts of the deficiencies in payment of such full dividends for the respective series.

3. *Preference on Liquidation, etc.* In the event of any liquidation, dissolution, or winding up of the Corporation, the holders of the Preferred Stock of each series shall be entitled to receive, for each share thereof, the liquidation price for such series, plus, in case such liquidation, dissolution, or winding up shall be voluntary, the liquidation premium for such series, if any, together in all cases with a sum equal to all dividends accrued or in arrears thereon, before any distribution of the assets shall be made to holders of Common Stock; but the holders of the Preferred Stock shall be entitled to no further participation in such distribution. If, upon any such liquidation, dissolution, or winding up, the assets distributable among the holders of the Preferred Stock shall be insufficient to permit the payment of the full preferential amounts aforesaid, then such assets shall be distributed among the holders of the Preferred Stock then outstanding, ratably in proportion to the full [fol. 31] preferential amounts to which they are respectively entitled. The expression "dividends accrued or in arrears" means, for the purposes of this Section 3 and of Section 4 of this Division A, in respect of each share of the Preferred Stock of any series, that amount which shall be equal to simple interest upon the sum of one hundred dollars at an annual rate equal to the percentage that the divided rate for

such series is of one hundred dollars, from the date from which cumulative dividends thereon commence to accrue to the date as of which the computation is to be made, less the aggregate amount of all dividends theretofore paid or deemed to have been paid. Nothing in this Section 3 shall be deemed to prevent the purchase, acquisition, or other retirement by the Corporation of shares of its Common Stock, and no such purchase, acquisition, or other retirement of shares of its Common Stock shall be deemed to be a liquidation, dissolution, or winding up of the Corporation. A merger of the Corporation into any other corporation, or merger of any other corporation into the Corporation, or consolidation of the Corporation with any other corporation, or a sale or transfer of the property of the Corporation as or substantially as an entirety shall not be deemed to be a liquidation, dissolution, or winding up of the Corporation.

4. *Redemption.* The Corporation may, at its option expressed by resolution of its board of directors, at any time or from time to time, except as otherwise provided with regard to the 3½% Convertible Preferred Stock in Section 11 of this Division A, redeem the whole or any part of the Preferred Stock or of any series thereof, at the redemption price for such series, together with a sum equal to all dividends accrued or in arrears thereon as of the redemption date; provided, however, that the Corporation shall not redeem less than all of the Preferred Stock at any time when full dividends with respect to all past dividend periods on the outstanding Preferred Stock shall not have been paid, or declared and set apart for payment. Notice of any proposed redemption of Preferred Stock shall be given by publication at least once in one newspaper printed in the English language and customarily published on each business day and of general circulation in the Borough of Manhattan, The City of New York, at least thirty (30) days (or any greater number of days that may have been fixed for any particular series) prior to the date fixed for such redemption. Notice of any proposed redemption of Preferred Stock shall also be given by the Corporation by mailing a copy of such notice, at least thirty (30) days (or any greater number of days that may have been fixed for any particular series) prior to the date fixed for such redemption to the holders of record of the Preferred Stock to be redeemed, at their respective addresses then appearing on the books of

the Corporation; but neither failure to mail such copy nor any defect therein or in the mailing thereof shall affect the validity of the proceedings for the redemption of any shares of the Preferred Stock so to be redeemed. In case of the redemption of a part only of any series of the Preferred Stock at the time outstanding, the Corporation shall select by lot or pro rata, as the board of directors may determine, the shares so to be redeemed. In any such selection, any shares issuable with respect to scrip certificates which may be outstanding and any shares of stock which may be held in the treasury of the Corporation shall be disregarded.

On or at any time before the redemption date, the Corporation shall deposit in trust, for the account of the holders of the shares to be redeemed, funds necessary for such redemption with a bank or trust company in good standing, organized under the laws of the United States of America or of the State of New York, doing business in the Borough of Manhattan, The City of New York, and designated or to be designated in such notice of redemption. Upon completing the publication as hereinabove provided of the notice of such redemption, or upon the earlier delivery to said bank or trust company of irrevocable authorization and direction to begin promptly and complete such publication of notice, all shares with respect to the redemption of which such deposit shall have been made and such publication completed or authorization therefor given shall, whether or not the certificates therefor shall have been surrendered for cancellation, be deemed no longer to be outstanding for any purpose, and all rights with respect to such shares shall thereupon cease and terminate, except only the right of the holders of the certificates for such shares to receive, out of the funds so deposited in trust, from and after the date of such deposit, the amount payable upon the redemption thereof, without interest; provided, however, that notwithstanding the above provision, any conversion right that may have been established for the shares of the Preferred Stock of any series shall continue to be exercisable in accordance with the provisions establishing it. If the Corporation shall satisfy such bank or trust company that any of the shares in respect of which such deposit was made have thereafter been converted into other stock, the Corporation shall be [fol. 82] entitled forthwith to receive the full amount deposited in respect of the shares so converted. At the expiration of five years after the redemeption date any such

monies then remaining on deposit with such bank or trust company shall be paid over to the Corporation, free of trust, and thereafter the holders of the certificates for such shares shall have no claims against such bank or trust company, but only claims as unsecured creditors against the Corporation for amounts equal to their pro rata shares of the monies so paid over without interest.

If, in connection with the accomplishment of any matter whatsoever, provision is to be made for the redemption of all of the Preferred Stock of any series at the time outstanding, then nothing in this Article VI shall be construed to confer on the holders of the Preferred Stock of such series, and they shall not have, any power or right to vote in respect of any such matter, except where, and to the extent that, a right to vote which can not be waived by the terms hereof is conferred by then existing laws of the Commonwealth of Virginia.

5. *Voting Rights.* Each holder of Preferred Stock shall be entitled to one vote for each share of such stock standing in his name on all matters lawfully coming before the shareholders of the Corporation, and the holders of Preferred Stock shall not be entitled to any separate class vote on any matter except as provided in Section 3 of Division C of this Article VI, or as required by law.

6. *Retirement Fund.* As and for a Retirement Fund for the purchase of Preferred Stock, the Corporation shall, within 30 days after the Merger Date, set aside the sum of $250,000, and, so long as accrued dividends on all shares of outstanding Preferred Stock shall have been paid for all past dividend periods, the Corporation shall on the first day of March in the year succeeding the first full calendar year after the Merger Date, and on the first day of March in each year thereafter, set aside an amount equal to 5% of the residuary earnings, as hereinafter defined, of the Corporation for the preceding calendar year, or an amount equal to the difference between the sum, if any, so set aside and held on such first day of March in said Retirement Fund and $1,000,000, whichever amount shall be less. Such fund shall be held and administered by the Corporation and shall be used, in whole or in part, on such occasions as the board of directors may in its sole discretion from time to time determine, for the purchase of shares of Preferred Stock of any series in the open market or at public or private sale at not

more than the redemption price thereof, plus the usual and customary brokerage commissions paid in connection with the purchase thereof.

For the purpose of calculation of payments (other than the initial payment as aforesaid) to the Retirement Fund, the residuary earnings of the Corporation for its preceding calendar year shall be deemed to be the net income after fixed charges for such year, less

(a) the amount of dividends payable during such year on outstanding Preferred Stock, and

(b) a Common Stock dividend allowance for such year (whether or not declared or paid) computed by multiplying the number of shares of the Common Stock outstanding as of the end of such year by $3.50 per share.

In the event that at any time or from time to time, the outstanding shares of the Common Stock shall be combined into a less number of shares, be subdivided into a greater number of shares, or be increased by a stock dividend, then the per share dividend allowance herein provided shall be subject to adjustment and shall, in the case of combination of shares, be the amount obtained by multiplying $3.50 by the number of shares combined into each new share of Common Stock, or, in the case of subdivision of shares, the amount obtained by dividing $3.50 by the number of shares issued in exchange for each share, or in the case of a stock dividend the amount obtained by dividing $3.50 by one share plus the share or shares or fraction of one share distributed as such dividend.

7. *Cancellation of Reacquired Shares.* All shares of Preferred Stock reacquired by the Corporation through redemption, purchase through any retirement or sinking fund, or conversion into Common Stock shall be cancelled, and shall be retired in accordance with Section 3781 of the Code of Virginia of 1919, as amended, but such cancellation and retirement shall not reduce the maximum authorized amount of the Preferred Stock.

[fol. 83] 8. *No Preemptive Rights.* The holders of Preferred Stock of the Corporation shall have no preemptive rights to purchase, or to have offered to them for purchase, any of the stock of any class or any other securities of the

Corporation which may be from time to time authorized, offered for sale, disposed of, or issued.

9. *3½% Convertible Preferred Stock.* The first series of Preferred Stock is hereby designated as "3½% Convertible Preferred Stock," of which 211,429.4 shares are to be issued in conversion of shares of stock of Pere Marquette Railway Company when the merger of that company into The Chesapeake and Ohio Railway Company shall become effective. The dividend rate on the shares of such series shall be $3.50 per share per annum, and the dividend payment dates shall be the first days of February, May, August, and November of each year. The liquidation price of the shares of such series shall be $100 per share, and the liquidation premium of such shares, $5 per share. All such shares shall have the conversion right provided in Section 10 of this Division A and shall be subject to redemption in accordance with the provisions of Section 4, except as otherwise provided in Section 11, of this Division A.

10. *Conversion Right of 3½% Convertible Preferred Stock.* Each share of 3½% Convertible Preferred Stock may, at the option of the holder thereof, be converted at any time into fully-paid and non-assessable shares of Common Stock of the Corporation at the conversion ratio in effect at the time of conversion, determined as hereinafter provided, upon surrender to the Corporation for such purpose of the certificate representing such stock; provided, however, that in respect of any stock called for redemption such conversion right shall expire at the close of business on the day preceding the redemption date. No adjustment shall be made on account of dividends accrued or in arrears on the 3½% Convertible Preferred Stock surrendered for conversion or for dividends on Common Stock issued upon such conversion. In the event that a holder of 3½% Convertible Preferred Stock, upon conversion as aforesaid, shall become entitled to receive a fractional interest in one share of Common Stock, the Corporation shall issue, in lieu of a fractional share certificate, a transferable non-dividend bearing, non-voting scrip certificate, in such form and expiring after such reasonable time as the board of directors may have prescribed before the issuance thereof, said scrip certificate to be exchangeable in amounts aggregating one or more full shares for a Common Stock

certificate representing such share or shares, together with a new scrip certificate of like tenor for any remaining fractional right.

Initially, the conversion ratio shall be 1.6 shares of Common Stock for each share of 3½% Convertible Preferred Stock (based upon a fixed conversion price of $100 per share for the 3½% Convertible Preferred Stock and an initial conversion price of $62.50 per share for the Common Stock), but if the happening of one or more of the events specified in the next succeeding paragraph hereof shall produce an adjusted conversion price of the Common Stock, a new conversion ratio, determinable by dividing $100 by such adjusted conversion price, shall be established provided such quotient shall result in an increase or decrease in the conversion ratio then in effect of 1/40th of a share, or any multiple thereof. Less fractions shall be disregarded unless and until their cumulative effect shall be to change the conversion ratio by 1/40th of a share.

In case the Corporation shall at any time, from time to time, subdivide the outstanding shares of Common Stock into a greater number of shares, the conversion price in effect immediately prior to such subdivision shall be proportionately reduced, and conversely, in case the outstanding shares of Common Stock of the Corporation shall be combined into a smaller number of shares, the conversion price in effect immediately prior to such combination shall be proportionately increased. In case the Corporation shall at any time, or from time to time, issue any shares of Common Stock, other than those referred to in the next sentence hereinbelow, for a consideration per share less than the conversion price in effect immediately prior to the time of such issue, or without consideration, then the conversion price shall be adjusted to the price obtained by multiplying the number of shares of Common Stock outstanding immediately prior to such issue by the then existing conversion price, adding to the result so obtained the value of the consideration, if any, received by the Corporation upon such issue, and dividing the sum so obtained by the total number of shares of Common Stock outstanding immediately after such issue. There shall, however, be no adjustment of the conversion price because of any of the following issues of Common Stock: (a) shares issued or issuable in conversion of shares of Pere Marquette Rail-
[fol. 84] way Company; (b) shares issued upon conversion

of any Convertible Securities as defined in the next succeeding paragraph, or upon the exercise of any rights, warrants, or options; and (c) shares theretofore acquired by the Corporation and then held in its treasury. Common Stock issued as a stock dividend shall, for the purposes of this paragraph, be deemed to have been issued without consideration.

If and whenever the Corporation shall issue any Convertible Securities, as hereinbelow defined, or shall issue any rights, warrants, or options to purchase Common Stock or Convertible Securities, then such issue shall, for the purposes of the next preceding paragraph, be deemed to be the issue (as of the date of issue of such Convertible Securities, or of such rights, warrants, or options) of the total maximum number of shares of Common Stock necessary to permit the conversion or exchange of all such Convertible Securities, or the exercise of all such rights, warrants, or options; and the amount received or receivable by the Corporation as consideration for the issue of such Convertible Securities, or of such rights, warrants, or options, plus the minimum aggregate amount, if any, payable to the Corporation upon such conversion, exchange, or exercise, shall be deemed to be the consideration actually received (as of the date of issue of such Convertible Securities, or of such rights, warrants, or options) for such Common Stock, and the maximum number of shares of Common Stock required to be issued as aforesaid shall, for this purpose, be deemed to be outstanding thereafter; provided, however, that upon the expiration of such conversion or exchange privilege or of such rights, warrants, or options, if any thereof shall not have been exercised, (1) the number of shares of Common Stock deemed to have been issued and outstanding by reason of the fact that they were issuable upon the exercise of such conversion or exchange privilege or of such rights, warrants, or options, which were not so converted, exchanged, or exercised, shall no longer be deemed to be issued and outstanding; and (2) the conversion price shall forthwith be readjusted and thereafter be the price which it would have been had adjustment been made on the basis of the issue only of the shares of Common Stock actually issued upon the exercise of such conversion or exchange privilege or of such rights, warrants, or options. For the purposes of this paragraph, "Convertible Securities" shall mean any stock or securities convertible

into or exchangeable for shares of Common Stock; and the "date of issue" of any Convertible Securities or of any rights, warrants, or options, shall be deemed to be the record date fixed by the board of directors of the Corporation for the determination of Common stockholders entitled to purchase any such Convertible Securities or to purchase or receive any such rights, warrants, or options, or, if Common stockholders shall not be entitled to purchase such Convertible Securities, then the date when payment of the consideration therefor is received by the Corporation.

In case any shares of Common Stock or any Convertible Securities or any rights, warrants, or options to purchase any such stock or securities shall be issued for cash, the consideration received therefor shall be deemed to be the amount received or receivable by the Corporation, after deducting therefrom any underwriting commissions or concessions paid or allowed by the Corporation in connection therewith. In case any shares of Common Stock or any Convertible Securities or any rights, warrants, or options to purchase any such stock or securities shall be issued, in connection with a purchase of assets for securities or upon a merger of another corporation into the Corporation, for a consideration other than cash (or a consideration which includes cash, if such cash constitutes a part of the assets of a corporation or business substantially all of the assets of which are being received as such consideration), then the board of directors of the Corporation shall, solely for this purpose, determine the fair value of such consideration, and such Common Stock, Convertible Securities, rights, warrants, or options shall be deemed to have been issued for an amount of cash equal to the value so determined by the board of directors.

In case of any reclassification or other adjustment of the capital stock of the Corporation, each share of the 3½% Convertible Preferred Stock shall thereafter be convertible into the number of shares of stock or other securities to which a holder of the number of shares of Common Stock of the Corporation deliverable upon conversion of such share of the 3½% Convertible Preferred Stock would have been entitled upon such reclassification or other adjustment; and, in any such case, appropriate adjustment (as determined by the board of directors) shall be made in the application of the provisions herein set forth, to the end that such rights shall thereafter continue to

be applicable, as nearly as reasonably may be, in rela-
[fol. 85] tion to any shares of stock thereafter deliverable upon the conversion of the shares of the 3½% Convertible Preferred Stock.

In the event of a consolidation of the Corporation with another corporation or corporations, or of a merger of the Corporation into another corporation, each share of 3½% Convertible Preferred Stock shall, at the option of the holder thereof, be exchangeable (1) for stock or securities of such consolidated corporation or of the corporation into which merger is effected at the ratio and upon the terms and conditions specified in the articles or agreement of consolidation or merger, or (2) for the amount of stock or securities of such consolidated corporation or of the corporation into which merger is effected as would, at the ratio and upon the terms and conditions specified in the articles or agreement of consolidation or merger, be given in exchange for the number of shares of Common Stock then issuable, in accordance with the conversion ratio in effect at that time, upon conversion of each share of 3½% Convertible Preferred Stock under the foregoing provisions.

Whenever the happening of any transaction or transactions results in an adjustment of the conversion ratio in accordance with the foregoing provisions of this Article VI, the Corporation shall cause notice of such adjustment to be mailed to the holders of record of the 3½% Convertible Preferred Stock and to the stock transfer agents of said stock and of the Common Stock.

In case (a) the Corporation shall pay any dividend or make any distribution upon its Common Stock payable otherwise than in cash, or (b) the Corporation shall offer to the Common stockholders subscription rights for any additional shares of stock of any class, or any other rights, warrants, or options, or (c) any reclassification or adjustment shall be made of the capital stock of the Corporation, or (d) a voluntary or involuntary dissolution or liquidation of the Corporation shall occur; then, and in any such case, the Corporation shall cause to be mailed to the holders of record of the 3½% Convertible Preferred Stock and to the transfer agent of said stock, a notice of at least 10 days stating the date on which (1) a record is to be taken for the purpose of such dividend, distribution, or offering of rights, warrants, or options, or (2) such reclassification or

adjustment of capital stock, or such dissolution or liquidation is to take place, and the date, if any is to be fixed, as of which holders of Common Stock of record shall be entitled to exchange their shares of Common Stock for stock, securities, or other property deliverable upon such reclassification or adjustment of capital stock or such dissolution or liquidation.

The Corporation shall initially reserve 338,287.04 shares of Common Stock to permit the conversion into Common Stock of the 211,429.4 shares of 3½% Convertible Preferred Stock to be issued in conversion of shares of stock of Pere Marquette Railway Company. Whenever, by reason of the foregoing provisions, the number of shares of Common Stock issuable upon conversion of each share of 3½% Convertible Preferred Stock shall be increased, the Corporation shall forthwith reserve a sufficient number of additional shares of Common Stock to provide for such increase, and the Corporation shall promptly obtain any necessary authorization of the Interstate Commerce Commission, and of any other regulatory body having jurisdiction over the issuance of securities of the Corporation, for the issuance of a sufficient number of shares of Common Stock to satisfy the conversion requirements of the 3½% Convertible Preferred Stock then outstanding.

The term "Common Stock" as used in connection with the provisions hereof for the adjustment of the conversion price shall include any shares of the Corporation now or hereafter authorized the right of which to dividends or assets is without limit as to any fixed amount or percentage; but the shares of Common Stock to be issued upon conversion of the 3½% Convertible Preferred stock shall include only shares of the class designated as Common Stock of the Corporation in this Agreement, or shares of any class or classes issued in substitution for such Common Stock upon any reclassification thereof.

If any certificate or certificates of Common Stock of the Corporation issuable upon conversion as aforesaid are to be issued in a name other than that appearing upon the certificate or certificates of 3½% Convertible Preferred Stock surrendered for exchange as hereinbefore provided, it shall be a condition of such conversion that the certificate or certificates so surrendered shall be properly endorsed for transfer and that the person presenting such stock for conversion shall pay to the Corporation or its transfer

[fol. 86] agent, any transfer or other taxes required by reason thereof, or establish to the satisfaction of the Corporation, or its transfer agent, that such taxes have been paid or are not payable.

A share of 3½% Convertible Preferred Stock shall be deemed to have been converted and the person in whose name the Common Stock is issued shall be deemed to have become a holder of record of Common Stock for the purpose of receiving dividends and for all other purposes whatsoever as of the date when the certificate for such Preferred Stock is surrendered to the Corporation as aforesaid, or if the books for the transfer of either class of stock shall at the time be closed, then, as of the next date when the books for the transfer of both classes of stock shall be opened; provided, however, that the right of conversion shall not in any case be suspended by closing said transfer books for a period longer than 30 days, nor at any time during the period of 30 days immediately preceding any date fixed for the redemption of 3½% Convertible Preferred Stock.

11. *Redemption Provisions of 3½% Convertible Preferred Stock.* The provisions of Section 4 of this Division A applicable to the redemption of Preferred Stock shall apply to the redemption of the 3½% Convertible Preferred Stock except as otherwise provided in this Section 11.

The redemption price of the shares of 3½% Convertible Preferred Stock shall be $105 per share. The redemption date of the Preferred Stock shall not be earlier than November 1, 1950, and thereafter shall be only a dividend payment date, but a call for redemption may be issued at any time prior to November 1, 1950.

If, upon issuing a call for redemption of all of the outstanding shares of the 3½% Convertible Preferred Stock, the Corporation shall deposit in trust with a bank or trust company the funds necessary for such redemption in accordance with the provisions of Section 4 of this Division A, and if the Corporation shall at the same time deposit in trust with such depositary, under an agreement of trust conforming to the provisions of this Section 11, such number of shares of its Common Stock as may be required at the conversion ratio then existing, to permit conversion of all such Preferred Stock into Common Stock, then all rights in this Agreement conferred upon the holders of such Preferred Stock shall cease and terminate, and each holder of

shares of such Preferred Stock shall thereafter have a beneficial interest in the trust proportionate to his Preferred Stock holding.

The depositary shall issue to each holder of shares of such Preferred Stock, upon surrender to it of the certificate therefor, a certificate representing shares of beneficial interest in the trust equal to the number of shares represented by the stock certificate so surrendered. Each share of beneficial interest shall entitle the holder thereof to the rights hereinafter provided.

Any holder of shares of beneficial interest shall at any time be entitled, upon surrender of the certificate therefor to such depositary for redemption, to receive out of the trust funds held by the depositary an amount equal to the sum theretofore deposited by the Corporation for and in respect of the shares so to be redeemed, less the aggregate amount of any and all sums theretofore disbursed with respect to said shares pursuant to the provisions hereinafter set forth. The depositary, upon making any such payment, shall release and transfer to the Corporation, out of the shares held by it in trust, the number of full shares of the Common Stock of the Corporation to which the holder of such certificate would have been entitled upon conversion thereof into Common Stock in accordance with the provisions of the next succeeding paragraph.

In lieu of surrendering his certificate for redemption, any holder of shares of beneficial interest may at any time surrender his certificate therefor to the depositary for conversion into Common Stock, and thereupon such certificate holder shall be entitled to receive from the depositary such number of full shares of the Common Stock of the Corporation held in trust (together with a scrip certificate for any fractional share) as he would then have been entitled to receive from the Corporation as a Preferred stockholder. The depositary, upon receiving for conversion any shares of beneficial interest, shall repay to the Corporation, out of the funds held by it in trust, an amount equal to the sum theretofore deposited by the Corporation for and in respect of the shares of beneficial interest so converted, less the aggregate amount of any and all sums therefore disbursed with respect to said shares pursuant to the next succeeding paragraph.

[fol. 87] Until each holder of any shares of beneficial interest shall have surrendered for redemption his certifi-

cate therefor or shall have exercised his conversion right as aforesaid (but in no event after the redemption date), the depositary, on the first days of February, May, August, and November of each year, shall distribute to such certificate holder, out of the funds held by it in trust, the sum of 87½¢ for and in respect of each share of beneficial interest then held by such certificate holder, according to the records of the depositary; but any sum so distributed shall be credited upon the amount distributable for and in respect of such share upon the redemption thereof.

If, prior to the redemption date, any change shall occur in the conversion ratio in accordance with the provisions of Section 10 of this Division A, the Corporation either shall deposit additional shares of Common Stock or shall be entitled to withdraw shares thereof previously deposited, to the end that there shall be held by the depositary at all times a number of shares of Common Stock sufficient for the conversion of all then outstanding shares of beneficial interest at the conversion ratio then in effect. Upon the redemption date, the depositary shall release and transfer to the Corporation all shares of Common Stock then held by it hereunder.

The certificates of beneficial interest shall be in such form as shall be determined by the depositary, with the approval of the Corporation, consistently with the provisions hereof, and shall be transferable on the books of the depositary. Upon and after the establishment of the trust, the certificates of 3½% Convertible Preferred Stock, until so exchanged, shall be deemed to be and shall be certificates of beneficial interest in the trust. The depositary shall be authorized to make and enforce any and all reasonable regulations, not inconsistent herewith, governing the issue and manner of exchange of such certificates of beneficial interest, as it in its discretion may deem advisable, and it shall maintain such books of registry and account and other records as shall be necessary to enable it to perform its duties hereunder.

All shares of Common Stock issued to the depositary and reacquired by the Corporation because of non-exercise of the conversion privilege hereinbefore set forth shall be cancelled, and shall be retired in accordance with Section 3781 of the Code of Virginia of 1919, as amended, but such cancellation and retirement shall not reduce the maximum authorized amount of the Common Stock.

Division B—Common Stock

1. *Dividends.* Dividends may be declared upon the Common Stock only after all dividends upon shares of Preferred Stock for the current and all past dividend periods shall have been paid, or shall have been declared and a sum sufficient for the payment thereof set apart, and only if the Corporation shall have set aside all amounts required to be set aside for the Retirement Fund as hereinbefore in this Article VI provided.

2. *Liquidation.* In the event of any liquidation or dissolution of the Corporation, whether voluntary or involuntary, the holders of Common Stock shall be entitled, to the exclusion of the holders of Preferred Stock, to share ratably in the assets of the Corporation remaining after payment of all amounts payable to the holders of Preferred Stock in accordance with their rights and privileges.

3. *Voting Rights.* Each holder of Common Stock shall be entitled to one vote for each share of said stock standing in his name on all matters lawfully coming before the shareholders of the Corporation.

4. *Preemptive Rights.* The holders of Common Stock shall have preemptive rights to purchase shares of any class of stock of the Corporation which at any time may be issued for a cash consideration, whether such stock shall be part of that authorized by this Agreement or shall be stock hereafter authorized, as well as any securities of the Corporation issued for a cash consideration which may be convertible into any of its stock or which may be issued with stock purchase warrants attached; provided, however, that there shall be no such preemptive rights to purchase any shares acquired by the Corporation as a result of, or upon a dissent from, the merger, or any other shares at any time acquired or reacquired by the Corporation and held in its treasury; and provided further that the preemptive rights of the Common stockholders shall only permit each such stockholder to purchase his proportionate share of such stock or securities, within such period as may be fixed by the board of directors of the Corporation, at such price and upon such [fol. 88] terms as may be fixed for the sale of such stock or securities by the board of directors; and provided further that, notwithstanding any of the foregoing provisions, no such preemptive rights shall exist in any holder of Common

Stock in any case where such rights shall have been waived by the affirmative vote of the holders of at least two-thirds of all of the shares of Common Stock then outstanding.

Division C—General Provisions

1. *Issuance and Sale of Shares.* Subject to the foregoing provisions of this Article VI, the board of directors of the Corporation in its discretion and without further approval or other action by the stockholders, but subject to all requisite authorization of public authorities, shall have power to cause the Corporation to issue and dispose of any and all shares of Preferred Stock and Common Stock of the Corporation at the time authorized but not herein provided to be issued in the merger of Pere Marquette Railway Company into the Corporation, and to create, issue, and dispose of any rights or options in respect of all or any part of such shares, to such persons, at such time or times, and for such considerations as may be fixed by the board of directors.

2. *Purchase of Shares.* So long as the Corporation shall have set aside all amounts required for the Retirement Fund provided for in Section 6 of Division A of this Article VI, the board of directors of the Corporation shall have the power, in its discretion and without action by the stockholders, to cause the Corporation to purchase any of the shares of its capital stock of any class at such price or prices (but, in the case of the Preferred Stock, at not exceeding the redemption price, plus the usual and customary brokerage commissions paid in connection with the purchase thereof) as the board may deem advisable or desirable (but in an aggregate amount not exceeding the surplus at the time of purchase), and to cancel such shares, or to hold them as treasury stock, or to resell them for such consideration as shall be approved from time to time by the board and authorized by the Interstate Commerce Commission; provided, however, that the Corporation shall not at any time purchase or otherwise acquire for a consideration, less than the whole of its then outstanding Preferred Stock, or purchase or otherwise acquire for a consideration any shares of its Common Stock, while dividends on the Preferred Stock for a period of one or more calendar years shall neither have been paid nor declared and set apart for payment; and further provided that monies in the Retirement Fund provided for in Section 6 of Division A of this

Article VI may be applied at any time to the purchase of Preferred Stock.

3. *Changes in Authorized Capital Stock and Other Amendments.* The number of authorized shares of capital stock of the Corporation of any class, or the amount of capital represented thereby, may be increased or decreased, one or more new classes of shares may be created, or the charter of the Corporation may be amended in any other way whatever without limitation; but any such action shall be effected in the manner and subject to the conditions and limitations prescribed by the laws of the Commonwealth of Virginia. It is, however, hereby expressly agreed, notwithstanding anything elsewhere in this Agreement contained, that, so long as any shares of the Preferred Stock shall be outstanding, the Corporation shall not authorize any shares of the Preferred Stock in addition to the 650,000 shares authorized by this Agreement except upon the written consent, or the affirmative vote at a meeting, of the holders of two-thirds of the total number of shares of Preferred Stock then outstanding; but upon such vote or consent, and any requisite vote or consent of the holders of the shares of Common Stock then outstanding, the Corporation shall be entitled at any time, or from time to time, to authorize such additional shares, or increase the maximum number of authorized shares, of the Preferred Stock, without limit in aggregate amount. . .

Article VII

The amount of the capital stock which Chesapeake shall issue in connection with the merger shall be $28,949,745, consisting of 211,429.4 shares of 3½% Convertible Preferred Stock and 312,272.2 shares of Common Stock. All such stock shall be issued in conversion of the outstanding capital stock of Pere Marquette, including shares of such stock owned by Chesapeake but excluding shares held in the treasury of Pere Marquette, and shall be deemed to have been issued as of the Merger Date. All such shares shall be fully-paid and non-assessable.

[fol. 89] Upon the Merger Date, the amount of the outstanding capital stock of Chesapeake shall be $220,383,595, consisting of the aforesaid 211,429.4 shares of 3½% Convertible Preferred Stock and 7,969,626.2 shares of Common Stock.

The manner of converting the outstanding shares of capi-

tal stock of Pere Marquette, and the distribution of the shares of the capital stock of Chesapeake to be issued in conversion of such capital stock of Pere Marquette shall be as follows:

Each of such shares of the 5% Cumulative Prior Preference Stock of Pere Marquette (including all accrued and unpaid dividends thereon as of the Merger Date) shall be converted on the Merger Date into one share of Preferred Stock and ⅓ of one share of Common Stock of Chesapeake.

Each of such shares of the 5% Cumulative Preferred Stock of Pere Marquette (including all accrued and unpaid dividends thereon as of the Merger Date) shall be converted on the Merger Date into 8/10 of one share of Preferred Stock and 4/10 of one share of Common Stock of Chesapeake.

Each of such shares of common stock of Pere Marquette shall, on the Merger Date, be converted into ½ of one share of Common Stock of Chesapeake.

All shares of the capital stock of Chesapeake issuable in conversion of shares of Pere Marquette held by Chesapeake on the Merger Date shall thereafter be held by Chesapeake in its treasury, and may be sold by Chesapeake, as fully-paid and non-assessable shares, subject to all requisite authorizations of the Interstate Commerce Commission and of any other regulatory body having jurisdiction over the issuance of securities of Chesapeake, to such persons, at such time or times, and for such considerations, as may be fixed by the board of directors.

Each share of Common Stock of Chesapeake outstanding on the Merger Date, including each share of such stock held by Chesapeake in its treasury, shall continue to be a share of Common Stock of Chesapeake, and the presently issued certificates for such stock shall continue to be valid certificates therefor, but the holders thereof shall be entitled to receive, in lieu of their present certificates, upon surrender thereof, new certificates bearing on their reverse the provisions of Article VI hereof.

Upon and after the Merger Date, each holder of a certificate or certificates of stock of Pere Marquette, upon surrender of such certificate or certificates for cancellation to an agent to be designated for the purpose by Chesapeake and Pere Marquette prior to the Merger Date, shall be entitled to receive a certificate or certificates, in definitive or temporary form, for the number of full shares of the

class or classes of stock of Chesapeake to which such stockholder shall be entitled pursuant to the foregoing provisions of this Article VII, and for any fractional rights resulting from such exchange as hereinafter provided. If certificates are originally issued in temporary form, such certificates, shall be exchangeable for definite certificates, without cost to the stockholders, as soon as they shall have been prepared.

Fractional rights to stock of Chesapeake resulting from the conversion of shares of Pere Marquette into shares of Chesapeake shall be provided for in the following manner:

For a period of three years next following the Merger Date, scrip certificates in bearer form shall be issued for such fractional rights. At any time within such three-year period, the Corporation, upon surrender to it of such scrip certificates in amounts representing in the aggregate one or more full shares of stock of the same class, shall issue a certificate or certificates for such number of full shares of such class of stock, together with a new scrip certificate for any remaining fractional right. The right to exchange scrip certificates for certificates representing full shares, as aforesaid, shall expire at the end of such three-year period. Scrip certificates shall not entitle the holder thereof to any of the rights, powers, or privileges of a stockholder of the Corporation, and the holder thereof shall have only such rights and privileges as are expressly provided for herein. The board of directors of the Corporation is authorized to make and enforce any and all reasonable regulations, not inconsistent herewith, governing the issue and manner of exchange of scrip certificates hereunder, as it in its discretion may deem advisable, including the appointment of an agent or agents for the purpose of exchanging stock certifi- [fol. 90] cates for scrip certificates and for the purpose of paying to bearers of scrip certificates the cash proceeds of the sales of stock as hereinafter provided.

As soon as may be practicable after the expiration of three years next following the Merger Date, the Corporation shall cause to be sold for cash, at public or private sale, at the then prevailing market prices, the aggregate number of shares of each class of stock deliverable upon the surrender of all script certificates outstanding at the end of such three-year period, together with an additional number of shares of each class of stock equal to the aggregate of the fractional rights in stock of such class which would re-

sult from the exchange of all certificates of stock of Pere Marquette not surrendered for exchange during such three-year period as hereinbefore provided. To the sum of money realized from the sale of all such shares of each class of stock, there shall be added the amount of all dividends declared and payable on said shares between the Merger Date and the date of such sale, and the aggregate sum of money applicable to each class of stock shall be held by the Corporation, or an agent to be appointed by it, as a fund for the benefit of holders of scrip certificates for, and of fractional rights to, the shares of such class. Thereafter, each holder of a scrip certificate for, or of a fractional right to, the shares of either class of stock, upon surrender of the scrip certificate, or of a certificate of stock evidencing such fractional right, shall be entitled to receive his pro rata share of the fund applicable to such class of stock, without interest, and he shall have no other or further rights in respect of said scrip certificate or of such fractional share right.

If the Corporation shall make payment to any stockholder for or in respect of any shares of stock of either of the parties hereto, whether pursuant to adjudication, compromise, purchase, or otherwise, or if the Corporation at any time shall be subject to liability to any stockholder who shall have dissented from the merger and such stockholder by reason of his dissent shall have forfeited his right to receive or to retain the shares in respect of which he shall have dissented, then, in each such case, the shares of the Corporation which such stockholder would have been entitled to receive or retain had he assented to the merger, or a number of shares equal thereto, may be sold by the Corporation as fully-paid and non-assessable shares, subject to all requisite authorization of the Interstate Commerce Commission and of any other regulatory body having jurisdiction over the issuance of securities of the Corporation, to such persons, at such time or times, and for such considerations, as may be fixed by the board of directors. If any shares are issued and sold hereunder before any such dissenting stockholder shall have surrendered to the Corporation his certificate for shares in respect of which he shall have dissented, the shares represented by such certificate, upon surrender thereof, shall be cancelled, but such cancellation shall not reduce the maximum authorized amount of the capital stock.

If any certificate or certificates of the stock of the Corporation are to be issued in a name other than that appearing upon the certificate or certificates of stock of Pere Marquette surrendered for exchange as hereinbefore provided, it shall be a condition of such issuance that the certificate or certificates so surrendered shall be properly endorsed for transfer and that the person requesting such exchange shall pay to the Corporation, or its transfer agent, any transfer or other taxes required by reason thereof, or establish to the satisfaction of the Corporation, or its transfer agent, that such taxes have been paid or are not payable.

From and after the date on which certificates for shares of stock of the Corporation shall have been made available for exchange in accordance with the foregoing provisions of this Article VII, the holders of shares of stock of Pere Marquette shall not be entitled to vote at any meeting of stockholders of the Corporation and shall not be entitled to receive any dividends unless and until they shall have actually exchanged their certificates of stock for temporary or definitive certificates of stock of the Corporation issuable in respect thereof, as herein provided, dividends theretofore declared then being payable. But the Corporation shall at all times from and after the Merger Date be entitled to treat the outstanding certificates for stock of Pere Marquette as evidencing respectively the ownership of the number of shares of stock of the Corporation into which such outstanding stock of Pere Marquette shall have been converted, notwithstanding the failure of any stockholders of Pere Marquette to exchange their certificates for certificates of stock of the Corporation in accordance with the foregoing provisions of this Article VII. After the Merger Date, there shall be no further issue or transfer of certificates of stock of Pere Marquette, and as such certificates are presented to the Corporation, they shall be cancelled and certifi- [fol. 91] cates of stock of the Corporation shall be issued in exchange therefor in accordance with the terms and conditions hereinbefore set forth.

No shares of stock of the Corporation shall be issued in exchange for shares of Pere Marquette owned by Pere Marquette and held in its treasury. On the Merger Date, all such shares shall be cancelled and retired.

Article VIII

This Agreement shall be submitted to the stockholders of each of the parties hereto at meetings separately held, and shall be subject to approval or sanction by the vote required by law of the stockholders of each of the parties hereto. This Agreement and the merger herein provided for shall also be submitted to the Interstate Commerce Commission and shall be subject to its approval and authorization.

This Agreement shall not become effective unless and until the holders of (a) at least 98% of the outstanding Prior Preference Stock of Pere Marquette, and at least 98% of its outstanding Preferred Stock and Common Stock held by others than Chesapeake, and (b) at least 98% of the outstanding Common Stock of Chesapeake shall vote for this Agreement and the merger provided for herein at the respective meetings of stockholders called for the purpose of considering this Agreement and said merger or at any adjournment or adjournments thereof, or shall otherwise irrevocably assent thereto; provided, however, that if upon any such meeting of the stockholders, such votes and assents shall be less than the required percentages specified above but shall be sufficient to satisfy the statutory requirements of the States of Virginia and Michigan, and if the board of directors of each of the parties hereto shall determine that it is practicable and desirable and in the interest of such party to consummate the merger with the votes and assents then obtained, such determination shall be certified in the certificates accompanying this Agreement, and this Agreement and said certificates shall thereupon be filed in the proper public office of the State of Michigan and with the State Corporation Commission of Virginia. But if, in the absence of the 98% vote or assent above specified, the board of directors of either of the parties hereto shall be of the opinion that the merger is, in all the circumstances, including the dissents impracticable or undesirable, it shall give notice of such determination to the other party hereto, and thereupon this Agreement shall terminate and be of no effect and there shall be no liability on the part of either of the parties hereto or its board of directors or stockholders.

This Agreement having received all requisite corporate authorization as above provided, and the merger herein provided for having been approved or authorized by the Inter-

state Commerce Commission, and an executed counterpart of this Agreement, duly certified by the appropriate corporate officers as provided by law, having been filed in the proper public office of the State of Michigan, the merger herein provided for shall become and be effective on the date (herein usually called the "Merger Date") when an executed counterpart of this Agreement duly certified as having been adopted or sanctioned by the stockholders shall, by order of the State Corporation Commission of Virginia, be admitted to record in its office.

On or before the Merger Date, Chesapeake shall take all steps necessary to qualify it to do business in the State of Michigan and in all other jurisdictions in which Pere Marquette is qualified to do business.

Article IX

If any stockholder who shall not have voted for the merger herein provided for or otherwise assented thereto shall desire to dissent therefrom, he may (and if so provided at the time by the law of the Commonwealth of Virginia, he shall) serve notice of such dissent on the president, secretary, or treasurer, either within or without the Commonwealth of Virginia, or his corporation, or on the statutory agent thereof, at any time within three months after the date of the meeting of the stockholders of his corporation to act on this Agreement of Merger, without awaiting the consummation of the merger.

This Agreement of Merger may be simultaneously executed in several counterparts, each of which so executed shall be deemed to be an original; and such counterparts shall together constitute but one and the same instrument.

[fol. 92] In Witness Whereof, the Boards of Directors of The Chesapeake and Ohio Railway Company and Pere Marquette Railway Company, by all or a majority of their respective members, have executed this Agreement under the corporate seals of said corporations, and said corporations have caused this Agreement to be executed in their respective corporate names by their respective Presidents and the respective corporate seals hereunto affixed to be attested by their respective Secretaries, all as of the day and year first above written.

The Board of Directors of The Chesapeake and Ohio Railway Company. By Leonard P. Ayres, Andrew Van Pelt,

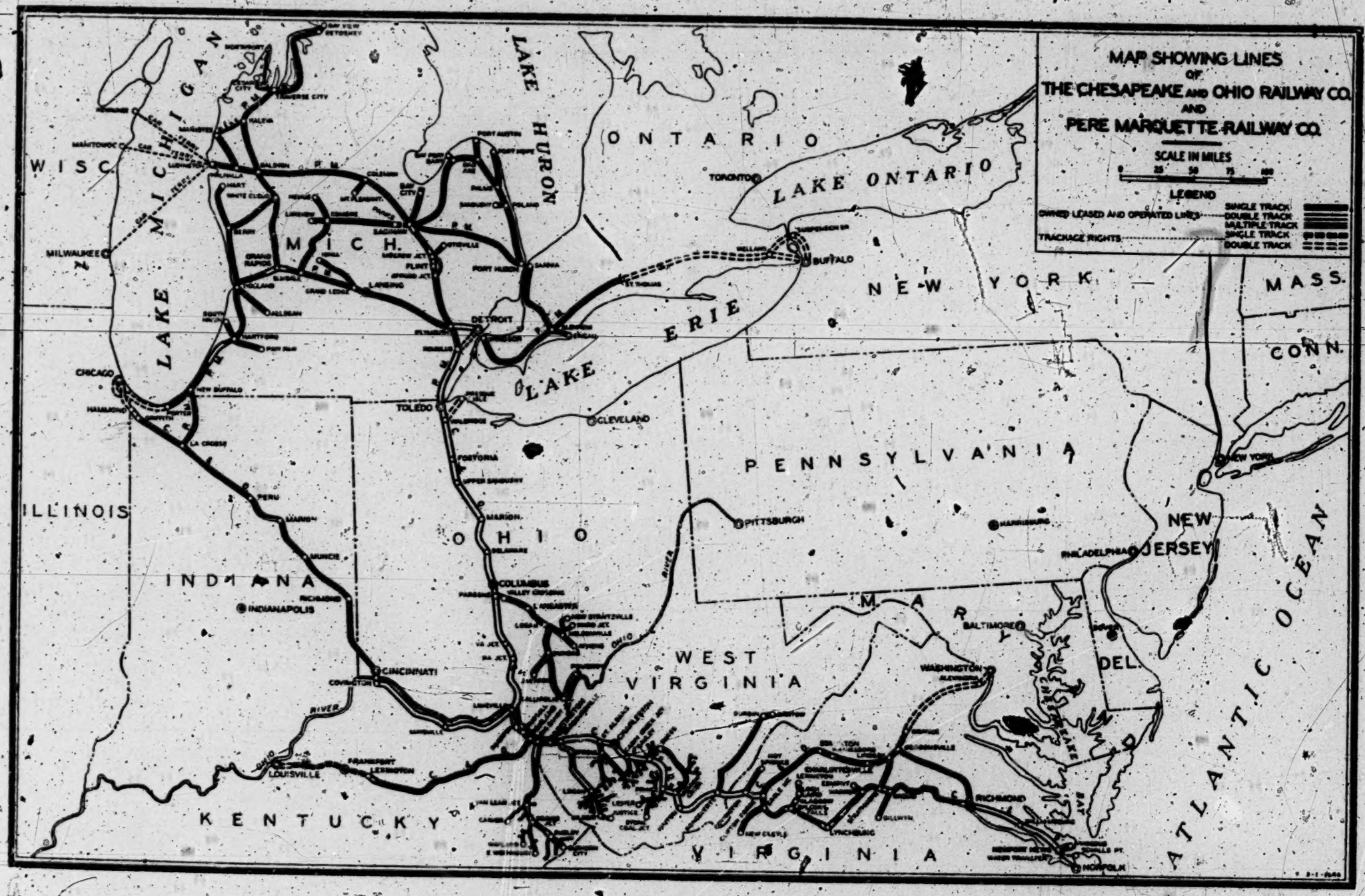
Harry C. Thompson, Henry J. Guild, Wm. H. Lipscomb, H. B. Erminger, Jr., Herbert Fitzpatrick, Carl E. Newton, C. S. Eaton, Harvey D. Gibson, Robert R. Young, Allan P. Kirby, James G. Blaine. Being all or a majority of their number.

The Chesapeake and Ohio Railway Company. By Carl E. Newton, *President*. Attest: H. F. Lohmeyer, *Secretary*. (Corporate Seal)

The Board of Directors of Pere Marquette Railway Company. By R. J. Bowman, J. J. O'Laughlin, Wilbur C. Manning, H. Dudley Swim, John L. Giles, Robert J. Bulkley, R. S. Marshall, H. B. Erminger, Jr., John E. Dwyer, James D. Miller, James E. Davidson, Walter S. McLucas. Being all or a majority of their number.

Pere Marquette Railway Company. By R. J. Bowman, *President*. Attest: H. F. Lohmeyer, *Secretary*. (Corporate Seal)

(Here follows 1 Photolithograph, side folio 93)


MAP SHOWING LINES
OF
THE CHESAPEAKE AND OHIO RAILWAY CO.
AND
PERE MARQUETTE RAILWAY CO.
SCALE IN MILES
0 25 50 75 100
LEGEND
OWNED LEASED AND OPERATED LINES
SINGLE TRACK
DOUBLE TRACK
MULTIPLE TRACK
TRACKAGE RIGHTS
SINGLE TRACK
DOUBLE TRACK
WISC.
MICH.
ONTARIO
LAKE HURON
LAKE MICHIGAN
LAKE ONTARIO
LAKE ERIE
NEW YORK
MASS.
CONN.
PENNSYLVANIA
NEW JERSEY
ILLINOIS
INDIANA
OHIO
WEST VIRGINIA
KENTUCKY
VIRGINIA
MD.
DEL.
ATLANTIC OCEAN
CHESAPEAKE BAY
MILWAUKEE
CHICAGO
DETROIT
TOLEDO
CLEVELAND
BUFFALO
TORONTO
PITTSBURGH
HARRISBURG
PHILADELPHIA
NEW YORK
BALTIMORE
WASHINGTON
INDIANAPOLIS
CINCINNATI
COLUMBUS
LOUISVILLE
RICHMOND
NORFOLK
LA CROSSE
PERU
MARION
MUNCIE
RICHMOND
FRANKFORT
LEXINGTON
PORTSMOUTH
CHARLOTTESVILLE
LYNCHBURG
OHIO RIVER

[fol. 94] EXHIBIT C-1

The Chesapeake and Ohio Railway Company

General Balance Sheet—as of December 31, 1945

Assets

Investments:		
Road and equipment property		$652,990,812
Improvements on leased property		277,848
Acquisition adjustment		323,417*
Donations and grants		2,862,140*
Investment in transportation property		650,083,103
Accrued depreciation—Road		6,742,884*
Accrued depreciation—Equipment		135,470,199*
Accrued amortization of defense projects—Road		6,053,493*
Accrued amortization of defense projects—Equipment		57,897,562*
Investment in transportation property less recorded depreciation and amortization		443,918,965
Sinking funds		238,116
Capital and other reserve funds		2,171,485
Miscellaneous physical property		8,094,132
Accrued depreciation—Miscellaneous physical property		1,456,798*
Miscellaneous physical property less recorded depreciation		6,637,334
Investments in affiliated companies		
Stocks		45,885,948
Bonds		2,150,000
All other		13,108,712
Other investments		
Stocks		18,827,338
Bonds		449,000
All other		144,958
		533,581,776

* Denotes reverse item.

EXHIBIT C-1—Continued

Less—Held by or for Company at date —Bonds (See contra)	265,000
	533,316,776
Less—Reserve for adjustment of investment in securities	2,686,901*
Total investments	530,629,875
Reserve for adjustment of investment in securities	2,686,901*
Total investments	530,894,875
Current Assets:	
Cash	26,008,221
Temporary cash investments	12,300,000
Special deposits	13,277,772
Loans and bills receivable	79,050
Net balance receivable from agents and conductors	1,622,719
Miscellaneous accounts receivable	7,140,420
Material and supplies	10,013,340
Interest and dividends receivable	192,656
Accrued accounts receivable	11,881,286
Other current assets	115,329
Total current assets	82,630,793
Deferred Assets:	
Working fund advances	34,910
Other deferred assets	802,398
Total deferred assets	837,308
Unadjusted Debits:	
Prepayments	60,151
Discount on funded debt	42,161
Other unadjusted debits	839,664
Securities issued or assumed—Unpledged:	
Stock (See contra)	25
Bonds (See contra)	395,000

* Denotes reverse item.

EXHIBIT C-1—Continued

Securities issued or assumed—Pledged:	
Bonds (See contra)	30,000,000
	31,337,001
Less—Held by or for Company at date (See contra)	30,395,025
Total unadjusted debits	941,976
Grand Total	$615,039,952

[fol. 95]

The Chesapeake and Ohio Railway Company

General Balance Sheet—as of December 31, 1945

Liabilities

Stock:	
Capital stock	$191,433,944
Less—Held by or for Company at date (See contra)	25
Total Stock outstanding with Public	191,433,919
Premiums and assessments on capital stock	2,301,093
Total stock	193,735,012
Long Term Debt:	
Funded debt unmatured	194,768,000
Equipment obligations	40,873,000
	235,641,000
Less—Held by or for Company at date (See contra)	30,660,000
Total long term debt outstanding	204,981,000
Current Liabilities:	
Traffic and car-service balances—Cr.	1,768,268
Audited accounts and wages payable	10,720,291
Miscellaneous accounts payable	2,948,177

EXHIBIT C-1—Continued

Interest matured unpaid	683,027
Dividends matured unpaid	5,880,532
Unmatured interest accrued	1,816,159
Accrued accounts payable	2,091,475
Taxes accrued	13,243,489
Other current liabilities	583,402
Total current liabilities	44,734,820
Deferred Liabilities:	
Other deferred liabilities	1,550,368
Total deferred liabilities	1,550,368
Unadjusted Credits:	
Premium on funded debt	21,876
Other unadjusted credits	5,372,737
Accrued depreciation—Leased property	35,841
Total unadjusted credits	5,430,454
Surplus:	
Unearned surplus	281,135
Earned surplus—Appropriated	16,408,664
Earned surplus—Unappropriated	147,918,499
Total surplus	164,608,298
Grand Total	$615,039,952

[fol. 96] EXHIBIT C-1

The Chesapeake and Ohio Railway Company

Notes to General Balance Sheet as of December 31, 1945

Note:

Capital and Other Reserve Funds:

Amount on deposit with Trustees under various Equipment Trusts for equipment sold or destroyed	$ 135,978
Amount on deposit with Trustees of various mortgages covering property sold	737,201
Proceeds from sale of Equipment Trusts	1,298,226
	$ 2,171,405

Note:

Special Deposits:

Reserve for contingent tax liability	$ 4,700,000
For payment of dividends	5,880,532
Amount of taxes collected account of Governmental Agencies	1,588,184
For payment of principal, premium and interest on bonds, equipment trusts, etc.	1,109,056
	$ 13,277,772

Note:

Accrued Accounts Receivable:

Tax refund due from U. S. Government	$ 7,782,237
Amount due from carriers for unreported freight and passenger revenues and per diem	3,714,790
Amount due from carriers and individuals for joint facility expenses, rents, etc.	384,259
	$ 11,881,286

EXHIBIT C-1—Continued

Note:

Taxes Accrued:

Normal and surtax	$ 7,951,938
Reserve for delayed income and excess profits tax	6,733,340
Other taxes	3,558,211
	$ 18,243,489

This Company is also liable as a guarantor of the following securities:

Guarantor of the Principal and Interest Jointly and Severally with Other Railway Companies:

Norfolk and Portsmouth Belt Line Railroad Company Serial 1½% Notes, due 1940 to 1949 (C. & O and seven companies)	$ 280,000
The Cincinnati Union Terminal Co. First Mortgage 3⅜% Bonds, due 1969 (C. & O. and six companies)	11,564,000
The Cincinnati Union Terminal Co. First Mortgage 2¾% Bonds, due 1974 (C. & O. and six companies)	23,797,000
The Cincinnati Union Terminal Co. First Mortgage 2.6% Bonds, due 1971 (C. & O. and six companies)	2,600,000

Other:

Guaranty of 9.68% of interest on $5,800,000 of The Toledo Terminal Railroad Company First Mortgage 4½% Bonds, due November 1, 1957.	

[fol. 97] (This Page Left Blank Intentionally)

[fol. 98] EXHIBIT C-2

Pere Marquette Railway Company

General Balance Sheet—as of December 31, 1945

Assets

Investments:		
Road and equipment property	$161,960,625	
Improvements on leased property	433,393	
Donations and grants	377,560*	
Investment in transportation property		161,516,458
Accrued depreciation—Road	1,150,329*	
Accrued depreciation—Equipment	37,832,313*	
Accrued amortization of defense projects—Road	84,990*	
Accrued amortization of defense projects—Equipment	7,994,952*	
Investment in transportation property less recorded depreciation and amortization		114,453,874
Sinking funds		870
Capital and other reserve funds		370,886
Miscellaneous physical property		1,179,940
Accrued depreciation—Miscellaneous physical property		96,318*
Miscellaneous physical property less recorded depreciation		1,083,622
Investments in affiliated companies		
Stocks		7,481,885
Bonds		—
All other		7,480,105
Other investments		
Stocks		583,565
Bonds		7,725
All other		96,394
		131,558,926

* Denotes reverse item.

EXHIBIT C-2—Continued

Less—Held by or for Company at date—Bonds (See contra)	300,000
Total investments	131,258,926
Current Assets:	
Cash	8,902,342
Temporary cash investments	4,251,818
Special deposits	879,754
Loans and bills receivable	71
Net balance receivable from agents and conductors	1,040,445
Miscellaneous accounts receivable	908,853
Material and supplies	4,639,564
Interest and dividends receivable	67,006
Accrued accounts receivable	1,356,812
Other current assets	32,269
Total current assets	22,078,934
Deferred Assets:	
Working fund advances	105,353
Insurance and other funds	112,666
Other deferred assets	936,471
Total deferred assets	1,154,490
Unadjusted Debits:	
Prepayments	130,884
Discount on funded debt	187,983
Other unadjusted debits	60,006
Securities issued or assumed—Unpledged:	
Stocks and scrip (See contra)	1,388
Bonds (See contra)	10,000,000
	10,380,261
Less—Held by or for Company at date (See contra)	10,001,388
Total unadjusted debits	378,873
Grand Total	$154,871,223

[fol. 99] EXHIBIT C-2

Pere Marquette Railway Company

General Balance Sheet—as of December 31, 1945

Liabilities

Stock:		
Capital stock	$ 68,675,000	
Less—Held by or for Company at date (See contra)	1,388	
Total Stock outstanding with Public		68,673,612
Long Term Debt:		
Funded debt unmatured	59,749,000	
Equipment obligations	6,357,736	
	66,106,736	
Less—Held by or for Company at date (See contra)	10,300,000	
Total long term debt outstanding		55,806,736
Current Liabilities:		
Traffic and car-service balances—Cr.		2,841,393
Audited accounts and wages payable		2,862,056
Miscellaneous accounts payable		750,359
Interest matured unpaid		23,817
Dividends matured unpaid		123
Unmatured interest accrued		584,629
Unmatured dividends declared		140,000
Accrued accounts payable		1,319,981
Taxes accrued		2,173,221
Other current liabilities		462,085
Total current liabilities		11,157,664
Deferred Liabilities:		
Other deferred liabilities		572,512
Total deferred liabilities		572,512

EXHIBIT C-2—Continued

Unadjusted Credits:	
Premium on funded debt	7,348
Other unadjusted credits	1,447,211
Accrued depreciation—Leased property	21,044
Total unadjusted credits	1,475,603
Surplus:	
Unearned surplus	10,013
Earned surplus—Appropriated	250,625
Earned surplus—Unappropriated	16,924,458
Total surplus	17,185,096
Grand Total	$154,871,223

[fol. 100]

Pere Marquette Railway Company

Notes To General Balance Sheet as of December 31, 1945

Note:

Capital and Other Reserve Funds:		
Amount on deposit with Trustees under various Equipment Trusts for equipment sold or destroyed	$	24,433
Amount on deposit with Trustee of First Mortgage for property sold		43,413
Provision for Sinking Fund contribution		300,000
Dividends unclaimed account of voting trust certificates outstanding from reorganization		3,040
	$	370,886

Note:

Special Deposits:		
For payment of principal, premium and interest on bonds, equipment trusts, etc.	$	328,341
Amount of taxes collected account of Governmental Agencies		551,413
	$	879,754

EXHIBIT C-2—Continued

Note:

Accrued Accounts Receivable:

Amount due from carriers for unreported freight and passenger revenues and per diem	$1,044,482
Tax refund due from U. S. Government	125,251
Amount due from carriers for joint facility expenses, rents, etc.	187,079
	$1,356,812

Note:

Taxes Accrued:

Normal and surtax, excess profits tax	$ 63,169
Reserve for delayed income and excess profits tax	653,991
Other taxes	1,456,061
	$2,173,221

This company is also contingently liable severally, as among the proprietary companies of Toledo Terminal Railroad Company, for 16.12% of the interest on $5,800,000 of that company's First Mortgage 4½% Bonds, due November 1, 1957.

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[fol. 102]

EXHIBIT C-3

The Chesapeake and Ohio Railway Company

Consolidated General Balance Sheet as of December 31, 1945, After Giving Effect to the Acquisition of Pere Marquette Railway Company, by Merger, in Accordance with the Plan.

	ASSETS	The Chesapeake	Pere Marquette	Combined	Adjustment for Acquisition of Pere Marquette	Adjusted and Consolidated
	Investments:					
701	Road and equipment property	$652,990,812.52	$161,960,624.67	$814,951,437.19	—	$814,951,437.19
702	Improvements on leased property	277,847.69	433,393.08	711,240.77	—	711,240.77
702½A	Acquisition adjustment	323,417.15	—	323,417.15	$10,253,148.93	10,576,566.08
702½B	Donations and grants	2,862,140.42	877,559.99	3,739,700.41	—	3,739,700.41
	Investment in transportation property	650,083,102.64	161,516,457.76	811,599,560.40	10,253,148.93	801,346,411.47
702½C	Accrued depreciation—Road	6,742,883.91	1,150,329.31	7,893,213.23	—	7,893,213.23
702½D	Accrued depreciation—Equipment	135,470,199.05	37,832,313.22	173,302,512.27	—	173,302,512.27
702½E	Accrued amortization of defense projects—Road	6,053,492.68	84,989.38	6,138,482.16	—	6,138,482.06
702½F	Accrued amortization of defense projects—Equipment	57,897,562.17	7,994,951.37	65,892,513.54	—	65,892,513.54
	Investment in transportation property less recorded depreciation and amortization	443,918,964.82	114,453,874.48	558,372,839.30	10,253,148.93	548,119,690.37
703	Sinking funds	288,116.27	870.00	288,986.27	—	288,986.27
704	Capital and other reserve funds	2,171,405.14	370,886.15	2,542,291.29	—	2,542,291.29
705	Miscellaneous physical property	8,094,132.20	1,179,939.68	9,274,071.88	—	9,274,071.88
705½	Accrued depreciation—Miscellaneous physical property	1,456,798.35	96,318.27	1,553,116.62	—	1,553,116.62
	Miscellaneous physical property less recorded depreciation	6,637,333.85	1,083,621.41	7,720,955.26	—	7,720,955.26

706	Investments in affiliated companies					
	a. Stocks	45,885,947.61	7,481,884.44	53,367,832.05	34,649,968.02	18,717,864.03
	b. Bonds	2,150,000.00	—	2,150,000.00	—	2,150,000.00
	c. Other secured obligations	700,000.00	—	700,000.00	—	700,000.00
	d. Unsecured notes	10,250,000.00	3,000,000.00	13,250,000.00	—	13,250,000.00
	e. Investment advances	2,158,712.28	4,480,105.44	6,638,817.72	—	6,638,817.72
707	Other investments					
	a. Stocks	18,827,337.76	583,564.85	19,410,902.61	—	19,410,902.61
	b. Bonds	449,000.12	7,725.00	456,725.12	—	456,725.12
	c. Other secured obligations	—	—	—	—	—
	d. Unsecured notes	123,839.25	96,394.28	220,233.53	—	220,233.53
	e. Investment advances	21,118.91	—	21,118.91	—	21,118.91
		533,581,776.01	131,558,926.05	665,140,702.06	44,908,116.95	620,237,585.11
	Less—Held by or for Company at date—Bonds (See contra)	265,000.00	300,000.00	565,000.00	—	565,000.00
		533,316,776.01	131,258,926.05	664,575,702.06	44,908,116.95	619,672,585.11
707½	Reserve for adjustment of investment in securities	*2,686,900.79*	—	*2,686,900.79*	—	*2,686,900.79*
	Total investments	530,629,875.22	131,258,926.05	661,888,801.27	44,908,116.95	616,985,684.32
	Current Assets:					
708	Cash	26,008,220.83	8,902,342.02	34,910,562.85	—	34,910,562.85
709	Temporary cash investments	12,300,000.00	4,251,818.19	16,551,818.19	—	16,551,818.19
711	Special deposits	13,277,772.20	879,753.88	14,157,526.08	—	14,157,526.08
712	Loans and bills receivable	79,050.19	70.82	79,121.01	—	79,121.01
714	Net balance receivable from agents and conductors	1,622,718.52	1,040,445.51	2,663,164.03	—	2,663,164.03
715	Miscellaneous accounts receivable	7,140,419.86	908,852.63	8,049,272.49	—	8,049,272.49
716	Material and supplies	10,013,339.62	4,639,563.99	14,652,903.61	—	14,652,903.61
717	Interest and dividends receivable	192,656.34	67,005.71	259,662.05	—	259,662.05
718	Accrued accounts receivable	11,881,286.32	1,356,812.40	13,238,098.72	—	13,238,098.72
719	Other current assets	115,329.41	32,268.98	147,598.39	—	147,598.39
	Total current assets	82,630,793.29	22,078,934.13	104,709,727.42	—	104,709,727.42

EXHIBIT C-3—Continued

The Chesapeake and Ohio Railway Company

Consolidated General Balance Sheet as of December 31, 1945, After Giving Effect to the Acquisition of Pere Marquette Railway Company, by Merger, in Accordance with the Plan.

	ASSETS	The Chesapeake	Pere Marquette	Combined	Adjustment for Acquisition of Pere Marquette	Adjusted and Consolidated
	Investments:					
	Deferred Assets:					
720	Working fund advances	34,909.93	105,352.63	140,262.56	—	140,262.56
721	Insurance and other funds	—	112,665.87	112,665.87	—	112,665.87
722	Other deferred assets	802,397.67	936,471.04	1,738,868.71	—	1,738,868.71
	Total deferred assets	837,307.60	1,154,489.54	1,991,797.14	—	1,991,797.14
	Unadjusted Debits:					
723	Prepayments	60,151.49	130,884.21	191,035.70	—	191,035.70
725	Discount on funded debt	42,160.64	187,983.11	230,143.75	—	230,143.75
727	Other unadjusted debits	839,663.56	60,006.03	899,669.59	—	899,669.59
728	Securities issued or assumed—Unpledged:					
	Stocks (See contra)	25.00	1,388.05	1,413.05	5,179,250.00	5,180,663.05
	Bonds (See contra)	395,000.00	10,000,000.00	10,395,000.00	—	10,395,000.00
729	Securities issued or assumed—Pledged:					
	Bonds (See contra)	30,000,000.00	—	30,000,000.00	—	30,000,000.00
		31,337,000.69	10,380,261.40	41,717,262.09	5,179,250.00	46,896,512.09
	Less—Held by or for Company at date (See contra)	30,395,025.00	10,001,388.05	40,396,413.05	—	40,396,413.05
	Total unadjusted debits	941,975.69	378,873.35	1,320,849.04	5,179,250.00	6,500,099.04
	Grand Total	$615,039,951.80	$154,871,223.07	$769,911,174.87	*$39,723,866.95*	$730,187,307.92

[fol. 103]

The Chesapeake and Ohio Railway Company

Consolidated General Balance Sheet as of December 31, 1945, After Giving Effect to the Acquisition of Pere Marquette Railway Company, by Merger, in Accordance with the Plan.

	LIABILITIES	The Chesapeake	Pere Marquette	Combined	Adjustment for Acquisition of Pere Marquette	Adjusted and Consolidated
	Stock:					
751	Capital stock					
	The Chesapeake and Ohio Railway					
	Common and scrip (7,657,355 shares—$25.00 par value)	$191,433,944.44	—	$191,433,944.44	—	$191,433,944.44
	Proposed New Issue					
	Common (312,272.2 shares) ($25.00 par value)	—	—	—	$ 7,806,805.00	7,806,805.00
	3½% Convertible Preferred (211,429.4 shares—$100.00 par value)	—	—	—	21,142,940.00	21,142,940.00
	Pere Marquette Railway					
	5% Prior Preference	—	11,200,000.00	11,200,000.00	*11,200,000.00*	—
	5% Preferred	—	12,429,000.00	12,429,000.00	*12,429,000.00*	—
	Common	—	45,046,000.00	45,046,000.00	*45,046,000.00*	—
		191,433,944.44	68,675,000.00	260,108,944.44	*39,725,255.00*	220,383,689.44
	Less—Held by or for Company at date (See contra)	25.00	1,388.05	1,413.05	1,388.05	25.00
		191,433,919.44	68,673,611.95	260,107,531.39	*39,723,866.95*	220,383,664.44
753	Premiums and assessments on capital stock	2,301,093.00	—	2,301,093.00	—	2,301,093.00
	Total Stock	193,735,012.44	68,673,611.95	262,408,624.39	*39,723,866.95*	222,684,757.44

The Chesapeake and Ohio Railway Company

Consolidated General Balance Sheet as of December 31, 1945, After Giving Effect to the Acquisition of Pere Marquette Railway Company, by Merger, in Accordance with the Plan.

	LIABILITIES	The Chesapeake	Pere Marquette	Combined	Adjustment for Acquisition of Pere Marquette	Adjusted and Consolidated
	Long Term Debt:					
755	Funded debt unmatured	194,768,000.00	59,749,000.00	254,517,000.00	—	254,517,000.00
756½	Equipment obligations	40,873,000.00	6,357,736.00	47,230,736.00	—	47,230,736.00
		235,641,000.00	66,106,736.00	301,747,736.00	—	301,747,736.00
	Less—Held by or for Company at date (See contra)	30,660,000.00	10,300,000.00	40,960,000.00	—	40,960,000.00
	Total long term debt outstanding	204,981,000.00	55,806,736.00	260,787,736.00	—	260,787,736.00
	Current Liabilities:					
758	Loans and bills payable	—	—	—	—	—
759	Traffic and car-service balances—Cr.	1,768,268.37	2,841,392.73	4,609,661.10	—	4,609,661.10
760	Audited accounts and wages payable	10,720,290.47	2,862,056.58	13,582,347.05	—	13,582,347.05
761	Miscellaneous accounts payable	2,948,177.23	750,358.93	3,698,536.16	—	3,698,536.16
762	Interest matured unpaid	683,027.14	23,817.22	706,844.36	—	706,844.36
763	Dividends matured unpaid	5,880,531.52	122.75	5,880,654.27	—	5,880,654.27
764	Unmatured interest accrued	1,816,158.76	584,628.88	2,400,787.64	—	2,400,787.64
765	Unmatured dividends declared	—	140,000.00	140,000.00	—	140,000.00
766	Accrued accounts payable	2,091,475.24	1,319,981.17	3,411,456.41	—	3,411,456.41
767	Taxes accrued	18,243,489.13	2,173,220.88	20,416,710.01	—	20,416,710.01
768	Other current liabilities	583,402.21	462,084.63	1,045,486.84	—	1,045,486.84
	Total current liabilities	44,734,820.07	11,157,663.77	55,892,483.84	—	55,892,483.84
	Deferred Liabilities:					
770	Other deferred liabilities	1,550,367.59	572,512.36	2,122,879.95	—	2,122,879.95
	Total deferred liabilities	1,550,367.59	572,512.36	2,122,879.95	—	2,122,879.95
	Unadjusted Credits:					
772	Premium on funded debt	21,875.64	7,347.87	29,223.51	—	29,223.51
778	Other unadjusted credits	5,372,736.98	1,447,211.36	6,819,948.34	—	6,819,948.34
779	Accrued depreciation — Leased property	35,841.47	21,044.00	56,885.47	—	56,885.47
	Total unadjusted credits	5,430,454.09	1,475,603.23	6,906,057.32	—	6,906,057.32
	Surplus:					
784	Unearned surplus	281,135.37	10,013.29	291,148.66	—	291,148.66
785	Earned surplus—Appropriated	16,408,663.67	250,625.00	16,659,288.67	—	16,659,288.67
786	Earned surplus—Unappropriated	147,918,498.57	16,924,457.47	164,842,956.04	—	164,842,956.04
	Total surplus	164,608,297.61	17,185,095.76	181,793,393.37	—	181,793,393.37
	Grand Total	$615,039,951.80	$154,871,223.07	$769,911,174.87	$39,725,866.95	$730,187,307.92

NOTE:—This statement reflects the combined accounts after giving effect to the exchange of securities under the plan of merger. Final balance sheets must have approval of the Bureau of Accounts of the Interstate Commerce Commission as of the date the merger is consummated.

[fol. 104] EXHIBIT C-4

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

INCOME STATEMENT—YEAR 1945

1. Operating Income		
Railway Operating Revenues		$203,332,146
Railway Operating Expenses	(A)	184,685,127
Net Revenue from Railway Operations		18,647,019
Railway Tax Accruals	(B)	2,803,083
Railway Operating Income		15,843,936
Rent Income		
Hire of Freight Cars—Credit Balance		7,980,961
Rent from Locomotives		300,991
Rent from Passenger-train Cars		153,308
Rent from Floating Equipment		45,378
Rent from Work Equipment		13,736
Joint Facility Rent Income		198,315
Total Rent Income		8,692,689
Rents Payable		
Rent for Locomotives		4,034
Rent for Passenger-train Cars		598,938
Rent for Floating Equipment		27,521
Rent for Work Equipment		4,097
Joint Facility Rents		1,876,780
Total Rents Payable		2,511,370
Net Rents		6,181,319
Net Railway Operating Income		22,025,255
II. Other Income		
Revenues from Miscellaneous Operations		48,355
Income from Lease of Road and Equipment		47,321
Miscellaneous Rent Income		153,656

EXHIBIT C-4—Continued

Miscellaneous Nonoperating Physical Property	91,352
Dividend Income	958,664
Income from Funded Securities	225,830
Income from Unfunded Securities and Accounts	227,842
Income from Sinking and Other Reserve Funds	2,694
Release of Premiums on Funded Debt	10,754
Miscellaneous Income	45,682
Total Other Income	1,812,150
Total Income	23,837,405
III. Miscellaneous Deductions from Income	
Expenses of Miscellaneous Operations	37,466
Taxes on Miscellaneous Operating Property	1,819
Miscellaneous Rents	46,136
Miscellaneous Tax Accruals	49,324
Miscellaneous Income Charges	247,531
Total Miscellaneous Deductions	382,276
Income Available for Fixed Charges	23,455,129
IV. Fixed Charges	
Rent for Leased Roads and Equipment	42,988
Interest on Funded Debt	
(a) Fixed Interest	7,003,784
Interest on Unfunded Debt	15,473
Amortization of Discount on Funded Debt	13,037
Total Fixed Charges	7,075,282
Net Income	16,379,847

EXHIBIT C-4—Continued

VI. Disposition of Net Income

Income Applied to Sinking and Other Reserve Funds		488,144
Total Appropriations of Income		488,144
Income Balance Transferred to Earned Surplus		$ 15,891,703
(A) Operating Expenses includes adjustment for accelerated amortization of defense facilities	$39,591,543	
(B) Railway Tax Accruals includes credit for Income and Excess Profits Taxes due to adjustment for accelerated amortization	$31,299,457	

[fol. 105]

EXHIBIT C-5

PERE MARQUETTE RAILWAY COMPANY

INCOME STATEMENT—YEAR 1945

1. Operating Income		
Railway Operating Revenues		$ 51,500,687
Railway Operating Expenses	(A)	45,558,794
Net Revenue from Railway Operations		5,941,893
Railway Tax Accruals	(B)	1,201,808
Railway Operating Income		4,740,085
Rent Income		
Hire of Freight Cars—Credit Balance		—
Rent from Locomotives		367,579
Rent from Passenger-train Cars		64,187
Rent from Floating Equipment		—

EXHIBIT 5—Continued

Rent from Work Equipment	58,126
Joint Facility Rent Income	459,775
Total Rent Income	949,667
Rents Payable	
Hire of Freight Cars—Debit Balance	34,518
Rent for Locomotives	313,568
Rent for Passenger-train Cars	191,112
Rent for Floating Equipment	4,135
Rent for Work Equipment	57,540
Joint Facility Rents	1,322,649
Total Rents Payable	1,923,522
Net Rents	973,855*
Net Railway Operating Income	3,766,230
II. Other Income	
Income from Lease of Road and Equipment	12,807
Miscellaneous Rent Income	170,363
Miscellaneous Nonoperating Physical Property	29,865
Dividend Income	232,126
Income from Funded Securities	18,991
Income from Unfunded Securities and Accounts	64,246
Income from Sinking and Other Reserve Funds	4,764
Release of Premiums on Funded Debt	3,385
Miscellaneous Income	478,818
Delayed Income Credits	—
Total Other Income	1,015,365
Total Income	4,781,595

* Denotes reverse item.

EXHIBIT 5—Continued

III. Miscellaneous Deductions from Income	
Miscellaneous Rents	48,694
Miscellaneous Tax Accruals	14,222
Separately Operated Properties—Loss	14,114
Miscellaneous Income Charges	31,201
Total Miscellaneous Deductions	108,231
Income Available for Fixed Charges	4,673,364
IV. Fixed Charges	
Rent for Leased Roads and Equipment	128,016
Interest on Funded Debt	
(a) Fixed Interest	2,397,994
Interest on Unfunded Debt	2,771
Amortization of Discount on Funded Debt	5,462
Total Fixed Charges	2,534,243
Net Income	2,139,121
VI. Disposition of Net Income	
Income Applied to Sinking and Other Reserve Funds	416,667
Total Appropriations of Income	416,667
Income Balance Transferred to Earned Surplus	$ 1,722,454

(A) Operating Expenses includes adjustment for accelerated amortization of defense facilities	*$3,787,393
(B) Railway Tax Accruals includes credit for Income and Excess Profits Taxes due to adjustment for accelerated amortization and invested capital	$2,036,285

*Denotes reverse item.

[fol. 106] EXHIBIT C-6

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
PERE MARQUETTE RAILWAY COMPANY

COMBINED INCOME STATEMENT—YEAR 1945

I. Operating Income		
Railway Operating Revenues		$254,832,833
Railway Operating Expenses	(A)	230,243,921
Net Revenue from Railway Operations		24,588,912
Railway Tax Accruals	(B)	4,004,891
Railway Operating Income		20,584,021
Rent Income		
Hire of Freight Cars—Credit Balance		7,946,443
Rent from Locomotives		668,570
Rent from Passenger-train Cars		217,495
Rent from Floating Equipment		45,378
Rent from Work Equipment		71,862
Joint Facility Rent Income		658,090
Total Rent Income		9,607,838
Rents Payable		
Rent for Locomotives		317,602
Rent for Passenger-train Cars		790,050
Rent for Floating Equipment		31,656
Rent for Work Equipment		61,637
Joint Facility Rents		3,199,429
Total Rents Payable		4,400,374
Net Rents		5,207,464
Net Railway Operating Income		25,791,485
II. Other Income		
Revenues from Miscellaneous Operations		48,355
Income from Lease of Road and Equipment		60,128
Miscellaneous Rent Income		324,019

EXHIBIT 6—Continued

Miscellaneous Nonoperating Physical Property	121,217
Dividend Income	1,190,790
Income from Funded Securities	244,821
Income from Unfunded Securities and Accounts	292,088
Income from Sinking and Other Reserve Funds	7,458
Release of Premiums on Funded Debt	14,139
Miscellaneous Income	524,500
Total Other Income	2,827,515
Total Income	28,619,000
III. Miscellaneous Deductions from Income	
Expenses of Miscellaneous Operations	37,466
Taxes on Miscellaneous Operating Property	1,819
Miscellaneous Rents	94,830
Miscellaneous Tax Accruals	63,546
Separately Operated Properties—Loss	14,114
Miscellaneous Income Charges	278,732
Total Miscellaneous Deductions	490,507
Income Available for Fixed Charges	28,128,493
IV. Fixed Charges	
Rent for Leased Roads and Equipment	171,004
Interest on Funded Debt	
(a) Fixed Interest	9,401,778
Interest on Unfunded Debt	18,244
Amortization of Discount on Funded Debt	18,499
Total Fixed Charges	9,609,525
Net Income	18,518,968

EXHIBIT 6—Continued

VI. Disposition of Net Income

Income Applied to Sinking and Other Reserve Funds		904,811
Total Appropriations of Income		904,811
Income Balance Transferred to Earned Surplus		$17,614,157
(A) Operating Expenses includes adjustment for accelerated amortization of defense facilities	$43,378,936	
(B) Railway Tax Accruals includes credit for Income and Excess Profits Taxes due to adjustment for accelerated amortization	$33,335,742	

Note: No eliminations have been made of intercompany transactions, as rental of equipment, car repairs, etc.

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EXHIBIT C-7

The Chesapeake and Ohio Railway Company

Income Account (Stated in thousands of dollars)

For the calendar years shown, adjusted to give effect to reduction in interest on funded debt

	1930	1931	1932	1933	1934	1935	1936	1937	1938	1939	1940
Operating revenues	$131,588	$119,540	$ 98,709	$105,953	$109,475	$114,025	$135,538	$127,347	$106,376	$118,722	$132,720
Operating expenses:											
Depreciation and amortization	6,202	7,219	7,075	7,108	6,964	8,103	8,512	8,272	8,297	8,248	8,456
Other operating expenses	76,826	67,279	48,890	51,218	53,851	55,187	61,502	64,257	56,149	60,612	65,632
Total operating expenses	83,028	74,498	55,965	58,326	60,815	63,290	70,014	72,529	64,446	68,860	74,088
Net revenue from railway operations	48,560	45,042	42,744	47,627	48,660	50,735	65,524	54,818	41,930	49,862	58,632
Railway tax accruals—Income and excess profits taxes	4,020	3,465	3,594	3,975	4,425	4,865	5,619	6,116	4,087	4,744	9,251
Railway tax accruals—All other taxes	5,779	6,160	5,748	5,601	5,873	5,815	7,699	6,674	8,509	8,552	8,990
Railway operating income	38,761	35,417	33,402	38,051	38,362	40,055	52,206	42,028	29,334	36,566	40,391
Net equipment and joint facility rents	754	Dr 87	Dr 900	Dr 1,084	Dr 1,364	Dr 117	529	587	Dr 351	Dr 212	427
Net railway operating income	39,515	35,330	32,502	36,967	36,998	39,938	52,735	42,615	28,983	36,354	40,818
Inter-company dividends:											
Pere Marquette	1,726	437	—	—	—	—	60	34	—	—	—
Other income less deductions	3,092	1,548	1,335	1,274	749	819	1,198	1,259	802	Dr 126	1,041
Net income available for interest	44,333	37,315	33,837	38,241	37,747	40,757	53,993	43,908	29,785	36,228	41,859
Interest on funded debt as reported	10,188	10,619	10,309	10,001	9,685	9,717	10,202	9,345	9,103	8,885	8,268
Net income as reported	34,145	26,696	23,528	28,240	28,062	31,040	43,791	34,563	20,682	27,343	33,591
Add (Note 1)											
Interest on debt as reported	10,188	10,619	10,309	10,001	9,685	9,717	10,202	9,345	9,103	8,885	8,268
Deduct (Note 1)											
Interest on debt outstanding December 31, 1945	6,922	6,922	6,922	6,922	6,922	6,922	6,922	6,922	6,922	6,922	6,922
Estimated increase in Federal income and excess profits taxes due to above adjustment	449	508	466	423	378	384	493	368	415	373	674
Adjusted net income	36,962	29,885	26,449	30,896	30,447	33,451	46,578	36,623	22,448	28,933	34,263
Earnings per share for 7,657,354 shares at December 31, 1945 (no deduction for preferred dividends)	$4.83	$3.90	$3.45	$4.03	$3.98	$4.37	$6.08	$4.78	$2.93	$3.78	$4.47
Earnings per share as reported (Note 2)	$4.46	$3.49	$3.07	$3.69	$3.67	$4.05	$5.72	$4.43	$2.62	$3.49	$4.31

* Tax credit resulting from capital losses on sale of securities increased net income approximately $12,000,000.

† Reflects acceleration of amortization of investment in defense facilities.

NOTE 1.—Adjustment to restate income to basis of present interest on debt.

NOTE 2.—Reflects deductions for dividends on 6½% preferred stock prior to 1937 and 4% preference stock, Series A, 1937 to 1943, inclusive.

1940	1941	1942	1943	1944	1945
$132,720	$150,237	$181,810	$208,512	$216,536	$203,332
8,456	8,615	11,282	15,618	19,719	59,717†
65,632	71,624	84,133	99,427	117,148	124,968
74,088	80,239	95,415	115,045	136,867	184,685
58,632	69,998	86,395	93,467	79,669	18,647
9,251	9,337*	39,255	48,944	38,838	Cr 8,853†
8,990	10,342	10,743	11,634	12,317	11,656
40,391	50,319	36,397	32,889	28,514	15,844
427	1,240	3,247	4,327	4,299	6,182
40,818	51,559	39,644	37,216	32,813	22,026
1,041	1,177	1,003	1,439	1,581	1,358
41,859	52,736	40,647	38,655	34,394	23,384
8,268	7,796	7,493	7,296	7,054	7,004
33,591	44,940*	33,154	31,359	27,340	16,380
8,268	7,796	7,493	7,296	7,054	7,004
6,922	6,922	6,922	6,922	6,922	6,922
674	514	462	302	113	38
34,263	45,300	33,263	31,431	27,359	16,429
$4.47	$5.92	$4.34	$4.10	$3.57	$2.15
$4.31	$5.79	$4.25	$4.04	$3.57	$2.14

[fols. 110–111]

EXHIBIT C–8

Pere Marquette Railway Company

Income Account (Stated in thousands of dollars)

For the calendar years shown, adjusted to give effect to reduction in interest on funded debt

	1930	1931	1932	1933	1934	1935	1936	1937	1938	1939	1940	1941
Operating revenues	$ 37,206	$ 27,338	$ 21,435	$ 21,934	$ 24,591	$ 28,470	$ 32,459	$ 32,229	$ 25,445	$ 30,233	$ 33,007	$ 39,048
Operating expenses:												
Depreciation and amortization	2,005	2,317	2,320	2,317	2,237	2,558	2,539	2,567	2,397	2,847	2,257	2,389
Other operating expenses	27,025	20,815	15,870	15,576	17,189	18,579	20,977	22,363	19,090	21,132	22,683	25,974
Total operating expenses	29,030	23,132	18,190	17,893	19,426	21,137	22,516	24,930	21,487	23,479	24,940	28,363
Net revenue from railway operations	8,176	4,206	3,245	4,041	5,165	7,333	8,943	7,299	3,958	6,754	8,067	10,685
Railway tax accruals—Income and excess profits taxes	Cr 77	Cr 18	48	58	52	119	475	205	54	108	308	1,099
Railway tax accruals—All other taxes	2,020	1,763	1,526	1,013	1,120	1,089	1,539	1,440	1,752	1,869	2,101	2,304
Railway operating income	6,233	2,461	1,671	2,970	3,993	6,125	6,929	5,654	2,152	4,779	5,658	7,282
Net equipment and joint facility rents—Dr.	1,691	1,176	1,346	1,245	1,374	1,296	1,350	1,194	1,297	1,426	1,595	1,167
Net railway operating income	4,542	1,285	325	1,725	2,619	4,829	5,579	4,460	855	3,353	4,063	6,115
Other income less deductions	403	434	250	211	213	185	448	462	164	215	394	335
Net income available for interest	4,945	1,719	575	1,936	2,832	5,014	6,027	4,922	1,019	3,568	4,457	6,450
Interest on funded debt as reported	2,930	3,582	3,620	3,535	3,443	3,380	3,269	3,253	3,278	3,239	3,204	3,213
Net income as reported	2,015	d 1,863	d 3,045	d 1,599	d 611	1,634	2,758	1,669	d 2,259	329	1,252	3,237
Add (Note 1)												
Interest on debt as reported	2,930	3,582	3,620	3,535	3,443	3,380	3,269	3,253	3,278*	8,930	8,204	3,212
Deduct (Note 1)												
Interest on debt outstanding December 31, 1945	1,827	1,827	1,827	1,827	1,827	1,827	1,827	1,827	1,827	1,827	1,827	1,827
Estimated increase in Federal and Canadian income and excess profits taxes due to above adjustment	132	—	—	—	—	210	407	367	—	154	330	430
Adjusted net income	2,986	d 108	d 1,252	109	1,005	2,976	3,793	2,728	d 808	1,587	2,300	4,192
Dividend requirements for 111,999 shares $100 par Prior Preference 5% Cumulative Stock outstanding December 31, 1945	560	560	560	560	560	560	560	560	560	560	560	560
Balance available for Preferred and Common stock	2,426	d 668	d 1,812	d 451	445	2,416	3,233	2,168	d 1,368	1,027	1,740	3,633
Dividend requirements for 124,288 shares $100 par Preferred 5% Cumulative Stock outstanding December 31, 1945	621	621	621	621	621	621	621	621	621	621	621	621
Balance available for Common stock	1,805	d 1,289	d 2,433	d 1,072	d 176	1,795	2,612	1,547	d 1,989	496	1,119	3,012
Earnings per share of 450,449 shares of $100 par Common stock outstanding December 31, 1945	$4.00	d $2.86	d $5.40	d $2.38	d $0.39	$3.98	$5.80	$3.42	d $4.42	$0.90	$2.48	$6.69

* Reflects acceleration of amortization of investment in defense facilities.

NOTE 1.—Adjustment to restate income to basis of present interest on debt.

d—deficit.

1940	1941	1942	1943	1944	1945
$ 33,007	$ 39,048	$ 44,311	$ 55,053	$ 56,368	$ 51,501
2,257	2,389	3,073	3,873	4,226	7,874*
22,683	25,974	29,471	35,325	38,994	37,685
24,940	28,363	32,544	39,198	43,220	45,559
8,067	10,685	11,767	15,855	13,088	5,942
308	1,099	2,464	5,835	4,567	Cr 1,465*
2,101	2,304	2,255	2,677	2,653	2,667
5,658	7,282	6,948	7,243	5,912	4,749
1,595	1,167	672	1,240	996	974
4,063	6,115	6,276	6,002	5,010	3,766
394	335	511	531	722	771
4,457	6,450	6,788	6,554	5,732	4,587
3,204	3,213	3,217	2,984	2,721	2,398
1,252	3,237	3,571	3,620	3,012	2,139
3,204	3,212	3,217	2,934	2,721	2,398
1,827	1,827	1,827	1,827	1,827	1,827
330	430	548	974	540	228
2,300	4,192	4,413	3,753	3,366	2,432
560	560	560	560	560	560
1,740	3,633	3,853	3,193	3,866	1,922
621	621	621	621	621	621
1,119	3,012	3,232	2,572	2,135	1,801
$2.48	$6.69	$7.13	$5.71	$4.25	$2.39

[fols. 112-113]

EXHIBIT C-9.

The Chesapeake and Ohio Railway Company

Pere Marquette Railway Company

Consolidated Income Account (Stated in thousands of dollars)

For the calendar years shown, adjusted to give effect to reduction in interest on funded debt, and to eliminate inter-company dividends

	1930	1931	1932	1933	1934	1935	1936	1937	1938	1939	1940	1941
Operating revenues	$168,794	$146,878	$120,144	$127,887	$134,066	$142,495	$167,997	$159,576	$131,821	$148,955	$165,727	$189,285
Operating expenses:												
Depreciation and amortization	8,207	9,536	9,395	9,425	9,201	10,661	11,051	10,839	10,694	10,595	10,713	11,004
Other operating expenses	103,851	88,094	64,760	66,794	71,040	73,766	82,479	86,620	75,239	81,744	88,315	97,598
Total operating expenses	112,058	97,630	74,155	76,219	80,241	84,427	93,530	97,459	85,933	92,339	99,028	108,602
Net revenue from railway operations	56,736	49,248	45,989	51,668	53,825	58,068	74,467	62,117	45,888	56,616	66,699	80,683
Railway tax accruals—Income and excess profits taxes	3,943	3,447	3,642	4,033	4,477	4,984	6,094	6,321	4,141	4,850	9,559	10,436
Railway tax accruals—All other taxes	7,799	7,923	7,274	6,614	6,993	6,994	9,238	8,114	10,261	10,421	11,091	12,646
Railway operating income	44,994	37,878	35,073	41,021	42,355	46,180	59,135	47,682	31,486	41,345	46,049	57,601
Net equipment and joint facility rents—Dr.	937	1,263	2,246	2,329	2,738	1,413	821	607	1,648	1,638	1,168	Cr 73
Net railway operating income	44,057	36,615	32,827	38,692	39,617	44,767	58,314	47,075	29,838	39,707	44,881	57,674
Inter-company dividends	1,726	437	—	—	—	—	60	34	—	—	—	—
Other income less deductions	3,495	1,982	1,585	1,485	962	1,004	1,646	1,721	966	89	1,435	1,512
Net income available for interest	49,278	39,034	34,412	40,177	40,579	45,771	60,020	48,830	30,804	39,796	46,316	59,186
Interest on funded debt as reported	13,118	14,201	13,929	13,536	13,128	13,097	13,471	12,598	12,381	12,124	11,472	11,009
Net income as reported	36,160	24,833	20,483	26,641	27,451	32,674	46,549	36,232	18,423	27,672	34,844	48,177
Less—												
Inter-company dividends	1,726	437	—	—	—	—	60	34	—	—	—	—
Net income, inter-company dividends eliminated	34,443	24,396	20,483	26,641	27,451	32,674	46,489	36,198	18,423	27,672	34,844	48,177
Add (Note 1)												
Interest on funded debt as reported	13,118	14,201	13,929	13,536	13,128	13,097	13,471	12,598	12,381	12,124	11,472	11,009
Deduct (Note 1)												
Interest on debt outstanding December 31, 1945	8,749	8,749	8,749	8,749	8,749	8,749	8,749	8,749	8,749	8,749	8,749	8,749
Estimated net increase in Federal and Canadian income and excess profits taxes due to adjustment of interest and elimination of inter-company dividends	547	499	466	423	378	594	899	629	415	527	1,004	944
Adjusted net income	38,256	29,349	25,197	31,005	31,452	36,428	50,312	39,418	21,640	30,520	36,563	49,493
Dividend requirements for 200,269 shares (after exchange) of Unified Company 3½% Preferred Stock	701	701	701	701	701	701	701	701	701	701	701	701
Balance available for Common stock	37,555	28,648	24,496	30,304	30,751	35,727	49,611	38,717	20,939	29,819	35,862	48,792
Adjusted earnings per share on 7,807,096 shares (after exchange) of Unified Company Common Stock	$4.81	$3.67	$3.14	$3.83	$3.94	$4.58	$6.35	$4.96	$2.68	$3.82	$4.59	$6.25

* Reflects acceleration of amortization of investment in defense facilities.

NOTE 1.—Adjustment to restate income to basis of present interest on debt.

1941	1942	1943	1944	1945
$189,285	$226,121	$263,565	$272,839	$254,833
11,004	14,355	19,491	23,945	67,593*
97,598	113,604	134,752	156,142	162,651
108,602	127,959	154,243	180,087	230,244
80,683	98,162	109,322	92,752	24,589
10,436	41,719	54,879	43,845	Cr 10,818*
12,646	13,098	14,311	14,975	14,323
57,601	43,345	40,182	34,432	20,584
Cr 73	Cr 2,575	Cr 3,087	Cr 3,891	Cr 5,207
57,674	45,920	43,219	37,823	25,781
1,512	1,514	1,990	2,304	2,130
59,186	47,434	45,209	40,127	27,921
11,009	10,710	10,230	9,775	9,402
48,177	36,724	34,979	30,352	18,519
—	—	—	—	—
48,177	36,274	34,979	30,352	18,519
11,009	10,710	10,230	9,775	9,402
8,749	8,749	8,749	8,749	8,749
944	1,010	1,450	643	261
49,493	37,675	35,010	30,735	18,911
701	701	701	701	701
48,792	36,974	34,309	30,034	18,210
$6.25	$4.78	$4.39	$3.85	$2.33

[fol. 114]

EXHIBIT C-10

The Chesapeake and Ohio Railway Company

Statement of Surplus

	1941	1942	1943	1944	1945
Unearned Surplus	$ —	$ —	$ 279,729	$ 281,135	$ 281,135
Earned Surplus—Appropriated					
Additions to Property Through Income and Surplus	26,945,664	26,561,773	23,859,636	9,846,552	9,626,297
Funded Debt Retired Through Income and Surplus	4,492,771	5,190,851	5,538,526	5,996,676	6,494,251
Sinking Fund Reserves	756,292	580,438	749,311	587,317	288,116
Excess Profits Tax Post-War Refund Reserve	—	—	87,135	—	—
Total Earned Surplus—Appropriated	32,194,727	32,333,062	30,234,608	16,430,545	16,408,664
Earned Surplus—Unappropriated					
Credits:					
Credit Balance (at beginning of year)	166,662,780	137,405,355	136,509,603	139,019,909	153,142,253
Credit Balance Transferred from Income	44,419,162	32,641,351	30,852,133	26,839,280	15,891,703
Credits from Retired Road and Equipment	3,862	3,895	—	—	—
Donations	61,319	34,200	—	—	—
Miscellaneous Credits	1,413,361	9,091,684	697,821	14,321,079	5,222,101
Total Credits	212,560,484	179,176,485	168,059,557	180,180,268	174,256,057
Debits:					
Surplus Applied to Sinking and Other Reserve Funds	66,271	10,140	10,000	10,025	16,288
Dividend Appropriations of Surplus	27,410,828	27,410,794	27,258,320	26,990,739	26,239,870
Surplus Appropriated for Investment in Physical Property	61,319	34,200	—	—	—
Debt Discount Extinguished Through Surplus	282,634	48,960	—	—	—
Miscellaneous Appropriations of Surplus	969,789	—	87,135	—	—
Debits from Retired Road and Equipment	46,364,288	2,106,634	—	—	—
Miscellaneous Debits		13,056,154	1,684,193	227,251	81,400
Total Debits	75,155,129	42,666,882	29,039,648	27,038,015	26,337,558
Total Earned Surplus—Unappropriated	137,405,355	136,509,603	139,019,909	153,142,253	147,918,499
Total Surplus	$169,600,082	$168,842,665	$169,534,246	$169,853,933	$164,608,298

[fol. 115]

Exhibit C-11

Pere Marquette Railway Company

Statement of Surplus

	1941	1942	1943	1944	1945
Unearned Surplus	$ —	$ —	$ —	$ —	$ 10,013
Earned Surplus—Appropriated					
Additions to Property Through Income and Surplus	262,283	267,844	—	—	—
Excess Profits Tax Post-War Refund Reserve	—	—	551,106	—	—
Funded Debt Retired Through Income and Surplus	—	—	—	—	249,755
Sinking Fund Reserve	—	—	—	—	870
Total Earned Surplus—Appropriated	262,283	267,844	551,106	—	250,625
Earned Surplus—Unappropriated					
Credits:					
Credit Balance (at beginning of year)	5,353,396	7,374,054	10,536,408	14,552,099	18,008,199
Credit Balance Transferred from Income	3,235,656	3,569,066	3,619,520	3,012,076	1,722,454
Credits from Retired Road and Equipment	1,179	486	—	—	—
Donations	1,367	5,561	—	—	—
Miscellaneous Credits	173,275	682,589	1,030,652	728,051	161,506
Total Credits	8,764,873	11,631,756	15,186,580	18,292,226	19,892,159
Debits:					
Dividend Appropriations of Surplus	—	—	—	—	560,000
Surplus Appropriated for Investment in Physical Property	1,367	5,561	—	—	—
Debt Discount Extinguished Through Surplus	7,125	4,540	—	—	—
Miscellaneous Appropriations of Surplus	—	—	551,106	43,145	—
Debits from Retired Road and Equipment	393,692	1,028,709	—	—	—
Miscellaneous Debits	988,635	56,538	83,375	240,882	2,407,701
Total Debits	1,390,819	1,095,348	634,481	284,027	2,967,701
Total Earned Surplus—Unappropriated	7,374,054	10,536,408	14,552,099	18,008,199	16,924,458
Total Surplus	$ 7,636,337	$10,804,252	$15,103,205	$18,008,199	$17,185,096

(Here follow 2 pasters, side folios 116, 117)

[fol. 116]

EXHIBIT C-12

The Chesapeake and Ohio Railway Company

Capitalization as of December 31, 1945

	Interest Rate	Date of Maturity	Total Par Value Authorized	Total Nominally or Actually Outstanding	Held by or for Company	Held by Company in its Treasury Pledged	Outstanding in Hands of Public
Funded Debt Unmatured:							
Mortgage Bonds:							
Potts Creek Branch—First	4%	July 1, 1946	$ 600,000	$ 600,000	$ 265,000		$ 335,000
Norfolk Terminal and Transportation Co.—First	5%	Feb. 1, 1948	500,000	500,000			500,000
Kanawha Bridge & Terminal Co.—First	5%	Apr. 1, 1948	500,000	274,000			274,000
Col. & Hock. Valley R. R. Co.—Ex. First	4%	Oct. 1, 1948	1,401,000	1,401,000			1,401,000
Columbus & Toledo R. R. Co.—Ex. First	4%	Aug. 1, 1955	2,500,000	2,441,000			2,441,000
Refunding and Improvement—Series G-1 to G-25	Various	Feb. 1, 1966	24,800,000	19,280,000			19,280,000
Rich. & Alleghany Division—First	4%	Jan. 1, 1989	6,000,000	6,000,000			6,000,000
Rich. & Alleghany Division—Second	4%	Jan. 1, 1989	1,000,000	998,000			998,000
General	4½%	Mar. 1, 1992	80,204,000	80,204,000		$80,000,000	50,204,000
Greenbrier Ry. Co.—Ex. First	3½%	Mar. 1, 1992	604,000	604,000			604,000
Refunding and Improvement—Series "D"	3½%	May 1, 1996	40,362,000	37,484,000	191,000		37,293,000
Refunding and Improvement—Series "E"	3½%	Aug. 1, 1996	29,500,000	27,601,000	304,000		27,397,000
Hocking Valley Ry. Co.—First Consld.	4½%	July 1, 1999	16,156,000	15,851,000			15,851,000
Total Mortgage Bonds			$204,127,000	$193,238,000	$ 660,000	$ 80,000,000	$162,578,000
Miscellaneous Obligations:							
Serial notes—Issue of 1935	Various	July 15, 1946	$ 15,300,000	$ 1,530,000			$ 1,530,000
Total Funded Debt Unmatured			$219,427,000	$194,768,000	$ 660,000	$ 30,000,000	$164,108,000
Equipment Obligations:							
Equipment Trust Certificates:							
Series of 1935	3%	Oct. 1, 1950	$ 9,000,000	$ 3,000,000			$ 3,000,000
Series of 1936	2¼%	June 15, 1946	9,280,000	928,000			928,000
Series of 1937	2%	Mar. 1, 1947	4,000,000	800,000			800,000
Series of 1939	2½%	Oct. 1, 1949	4,200,000	1,680,000			1,680,000
Series of 1940	1¾%	Aug. 1, 1950	2,500,000	1,250,000			1,250,000
Series of 1941	1⅝%	May 1, 1951	5,100,000	3,060,000			3,060,000
Second Series of 1941	1⅝%	June 15, 1951	3,100,000	1,860,000			1,860,000
Third Series of 1941	1⅝%	Aug. 1, 1951	4,300,000	2,580,000			2,580,000
Series of 1942	1¾%	Feb. 15, 1952	5,150,000	3,605,000			3,605,000
Series of 1943	1¾%	May 1, 1953	5,200,000	4,160,000			4,160,000
Series of 1944	1¾%	Apr. 1, 1954	2,200,000	1,980,000			1,980,000
Second Series of 1944	1¾%	July 15, 1954	2,500,000	2,250,000			2,250,000
Third Series of 1944	1¾%	Sept. 1, 1954	2,500,000	2,250,000			2,250,000
Fourth Series of 1944	1¾%	Sept. 15, 1954	2,500,000	2,250,000			2,250,000
Fifth Series of 1944	1¾%	Oct. 1, 1954	2,200,000	1,980,000			1,980,000
Sixth Series of 1944	1¾%	Nov. 15, 1954	3,600,000	3,240,000			3,240,000
Series of 1945	1⅝%	May 15, 1955	2,500,000	2,500,000			2,500,000
Second Series of 1945	1½%	July 1, 1955	1,500,000	1,500,000			1,500,000
Total Equipment Obligations			$ 71,330,000	$ 40,873,000			$ 40,873,000
		No. Shares	Par Value				
Capital Stock:							
Common and scrip		7,657,355	$25	$191,433,944	$ 25		$191,433,919
Premium on Common Stock							2,301,093
Total Stock							$193,735,012
Total Capitalization							$398,716,012

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EXHIBIT C-13

Pere Marquette Railway Company

Capitalization as of December 31, 1945

	Interest Rate	Date of Maturity	Total Par Value Authorized	Total Nominally or Actually Outstanding	Held by or for Company	Held by Company in its Treasury Pledged	Outstanding in Hands of Public
Funded Debt Unmatured:							
Mortgage Bonds:							
P. M. Ry. Co.—First, Series "D"	3⅜%	Mar. 1, 1980	$ 60,000,000	$ 59,749,000	$ 10,300,000		$ 49,449,000
Total Mortgage Bonds			$ 60,000,000	$ 59,749,000	$ 10,300,000		$ 49,449,000
Total Funded Debt Unmatured			$ 60,000,000	$ 59,749,000	$ 10,300,000		$ 49,449,000
Equipment Obligations:							
Equipment Trust Certificates:							
Series of 1936	2½%	July 1, 1946	$ 1,220,000	$ 122,000			$ 122,000
Series of 1937	2¾%	May 1, 1947	1,940,000	388,000			388,000
Series of 1940	2%	Nov. 15, 1950	2,220,000	1,110,000			1,110,000
Series of 1941	2⅛%	June 1, 1956	2,775,000	2,035,000			2,035,000
Series of 1942	2%	June 15, 1952	680,000	476,000			476,000
Series of 1944	2¼%	Feb. 1, 1959	2,220,000	2,072,000			2,072,000
Equipment Contracts:							
Electro-Motive Division, General Motors Corp.—Assigned to J. P. Morgan and Co., Inc.	1.9%	Nov. 1, 1947	251,280	92,136			92,136
Electro-Motive Division, General Motors Corp.—Assigned to Cleveland Trust Company	1.609%	Nov. 1, 1955	62,600	62,600			62,600
Total Equipment Obligations			$ 11,368,880	$ 6,357,736			$ 6,357,736
		No. Shares	Par Value				
Capital Stock:							
Common and Scrip		450,460	$100	$ 45,046,000	$ 1,128		$ 45,044,872
Prior Preference and scrip		112,000(a)	100	11,200,000	76		11,199,924
Preferred and Scrip		124,290(b)	100	12,429,000	184		12,428,816
Total Stock				$ 63,675,000	$ 1,388		$ 68,673,612
Total Capitalization							$124,480,348

Unpaid accumulated dividends as of December 31, 1945 amounted to:

(a) $4,013,323.34, or $35.83 per share.

(b) $8,959,237.50, or $72.00 per share.

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EXHIBIT C–14

The Chesapeake and Ohio Railway Company

Securities Owned December 31, 1945

	Number of Shares or Face Value	Par or Face Value	Book Value
Investments in Carrier Companies Directly Connected with Chesapeake and Ohio Railway Operations:			
The Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company			
Common Stock	15,000*	$ 1,500,000.00	$ 146,987.00
First Mortgage Bonds	$ 3,010,000.00*	3,010,000.00	2,150,000.00
Promissory Note		3,000,000.00	3,000,000.00
The Cincinnati Inter-Terminal Railroad Company			
Preferred Stock	1,030	103,000.00	103,620.00
The Cincinnati Union Terminal Company			
Common Stock	5,000	500,000.00	500,000.00
Advances		103,679.15	103,679.15
Lexington Union Station Company			
Preferred Stock	309	30,900.00	30,900.00
Common Stock	50	5,000.00	Nil
Nicholas, Fayette and Greenbrier Railroad Company			
Common Stock	37,359	3,735,900.00	3,757,461.59
Advances		1,546,550.59	1,546,550.59
Norfolk and Portsmouth Belt Line Railroad Company			
Common Stock	72	7,200.00	7,200.00
Advances		72,500.00	72,500.00
Railway Express Agency, Inc.			
Common Stock	10	No Par	1,000.00
Advances		242,442.17	242,442.17
Rockcastle Railroad Company			
Common Stock	388	38,800.00	38,800.00
Advances		17,143.49	17,143.49

EXHIBIT C-14—Continued

	Number of Shares or Face Value	Par or Face Value	Book Value
The Toledo Terminal Railroad Company			
Common Stock	3,872	387,200.00	1.00
The Belt Railway Company of Chicago			
Common Stock	2,400*	240,000.00	240,000.00
Fruit Growers Express Company			
Common Stock	465	46,500.00	56,161.71
Total			$12,014,446.70
Investments in Subsidiary Non-Carriers—Wholly-Owned:			
Chesapeake Mineral Company			
Common Stock	100*	$ 10,000.00	$ 10,000.00
The Silver Grove Land and Building Company			
Common Stock	1,000	100,000.00	100,000.00
Advances		1,650.00	1,650.00
Western Pocahontas Corporation			
Common Stock	2,500	250,000.00	250,000.00
Promissory Notes		7,250,000.00	7,250,000.00
Western Pocahontas Fuel Company			
Common Stock	10,000	1,000,000.00	1,000,000.00
Coupon Notes		700,000.00	700,000.00
Total			$ 9,311,650.00

* Pledged.

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EXHIBIT C-14

The Chesapeake and Ohio Railway Company

Securities Owned December 31, 1945—Continued

	Number of Shares or Face Value	Par or Face Value	Book Value
Investments in Listed Securities:			
Erie Railroad Company			
Voting Trust Certificate, Common Stock	46,700	No Par	$ 2,886,031.94
Voting Trust Certificate, Series "A" 5% Preferred Stock	259	$ 25,900.00	26,097.48
General Mortgage Income 4½% Bonds, Series "A"	$ 27,750.00	27,750.00	38,400.12
Pere Marquette Railway Company			
Common Stock	313,900	31,390,000.00	33,464,792.12
Preferred Stock	18,950	1,395,000.00	1,185,175.90
The New York, Chicago and St. Louis Railroad Company			
Common Stock	192,400	19,240,000.00	4,286,610.00
The Wheeling and Lake Erie Railway Company			
Certificate of Deposit, Common Stock	78,145	7,814,500.00	4,168,388.34
Certificate of Deposit, Preferred Stock	1,658	165,800.00	161,406.30
			$46,216,902.20
Less Reserve for Adjustments of Investments in Securities of Erie Railroad Company			2,686,900.79
Total			$43,530,001.41
Miscellaneous Investments:			
First National Bank Building Corporation			
Common Stock	3,185	$ 318,500.00	$ 318,500.00

EXHIBIT C-14—Continued

	Number of Shares or Face Value	Par or Face Value	Book Value
Richmond-Washington Company			
Common Stock	6,674	667,400.00	444,900.00
Standard Carloading Corporation			
Common Stock	450	45,000.00	444,339.99
Promissory Notes		93,000.00	93,000.00
The Railroad Credit Corporation			
Advances		174,746.88	174,746.88
Virginia Hot Springs, Incorporated			
Second Lien Bonds, Series "A"	$ 410,600.00	410,600.00	410,600.00
The Wheeling and Lake Erie Railway Company			
Certificate of Deposit, Prior Lien Stock	115,369	11,536,900.00	11,075,811.00
Other			61,059.16
Total			$13,022,957.03
Grand Total			$77,879,055.14

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Exhibit C-14

The Chesapeake and Ohio Railway Company

Securities Owned by Wholly-Owned Subsidiaries December 31, 1945

	Number of Shares or Face Value	Par or Face Value	Book Value
Western Pocahontas Corporation:			
Investments in Listed Securities:			
Pere Marquette Railway Company			
Preferred Stock	6,000	$ 600,000.00	$ 240,422.50
The New River Company			
Preferred Stock	21,844	2,184,400.00	2,114,504.80
Common Stock	13,239	1,323,900.00	
Total			2,354,927.30
Miscellaneous Investments:			
The Beachwood Corporation			
Common Stock	500	No Par	$ 60,000.00
First Mortgage 6% Bonds	$ 350,000.00	$ 350,000.00	$ 350,000.00
Demand Note		1,000.00	1,000.00
The Lucas County Railroad Company			
Common Stock	5	No Par	500.00
Demand Notes		32,950.00	32,950.00
The Community Hotel Company			
Common Stock	5	500.00	500.00
Chesapeake Mineral Company			
Advances		44,858.45	44,858.45
Total			$ 489,808.45
Grand Total			$ 2,844,735.75

EXHIBIT C-14—Continued

	Number of Shares or Face Value	Par or Face Value	Book Value
Western Pocahontas Fuel Company:			
Investments in Listed Securities:			
Chicago and Eastern Illinois Railroad Company General Mortgage Income Bonds (Convertible)	$ 175,000.00	$ 175,000.00	$ 42,875.00
The Covington and Cincinnati Elevated Railroad and Transfer and Bridge Company:			
Miscellaneous Investments:			
The Chesapeake and Ohio Railway Company General Mortgage 4½% Bonds	$ 2,075,000.00*	$ 2,075,000.00	$ 2,075,000.00
Greenbrier Railway Company First Mortgage Extended 3½% Bonds	$ 604,000.00*	604,000.00	604,000.00
The Cincinnati Inter-Terminal Railroad Company			
Common Stock	100	10,000.00	1.00
Advances		270,823.70	270,823.70
Total			$ 2,949,824.70

* Pledged.

[fol. 121]

Exhibit C-15

Pere Marquette Railway Company

Securities Owned December 31, 1945

		Number of Shares or Face Value	Par or Face Value	Book Value
Investments in Carrier Companies Directly Connected with the Pere Marquette Railway Operations:				
Flint Belt Railroad Company	Common Stock	10,000*	$ 1,000,000.00	$ 1,000,000.00
	Advances		187,000.00	187,000.00
Manistee and Northeastern Railway Company	Common Stock	8,537*	853,700.00	276,045.81
Railway Express Agency, Incorporated	Common Stock	7*	No Par	700.00
	Advances		169,709.57	169,709.57
The Belt Railway Company of Chicago	Common Stock	2,400*	240,000.00	240,000.00
The Fort Street Union Depot Company	Common Stock	6,765*	676,500.00	566,037.70
The Lake Erie and Detroit River Railway Company	Common Stock	14,000*	1,400,000.00	2,870,000.00
	Promissory Note	$ 3,000,000.00*	3,000,000.00	3,000,000.00
	Advances		3,857,364.13	3,857,364.13**
Fruit Growers Express Company	Common Stock	1,002*	100,200.00	123,103.43
The Toledo Terminal Railroad Company	Common Stock	6,448*	644,800.00	1.00
Total				$12,289,961.64
Investments in Subsidiary Non-Carriers—Wholly-owned:				
The Lake Erie Coal Company, Limited	Common Stock	5,000*	$ 500,000.00	$ 375,000.00
Pere Marquette Radio Corporation	Common Stock	500*	5,000.00	5,000.00
Total				$ 380,000.00

EXHIBIT C-15—Continued

		Number of Shares or Face Value	Par or Face Value	Book Value
Investments in Listed Securities:				
Erie Railroad Company	General Mtge. Income 4½% Bonds, Series "A"	$ 15,000.00	$ 15,000.00	$ 7,725.00
Miscellaneous Investments:				
The Railroad Credit Corporation	Advances		$ 49,524.79	$ 49,524.79
Green Real Estate Company	Common Stock	148,050*	No Par	2,149,099.93
	Advances		216,506.95	216,506.95
Standard Carloading Corporation	Common Stock	450	45,000.00	444,339.99
	Promissory Notes		93,000.00	93,000.00
Other				19,515.71
Total				$ 2,97[illegible]87.37
Grand Total				$15,649,674.01

* Pledged.
** $2,957,526.37 pledged.

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EXHIBIT C-15

Pere Marquette Railway Company

Securities Owned by Wholly-Owned Subsidiaries December 31, 1945

	Number of Shares or Face Value	Par or Face Value	Book Value
Securities Owned by Wholly-Owned Carrier Subsidiary:			
Schedule A			
Manistee and Northeastern Railway Company:			
Miscellaneous investments:			
Leelanau Transit Company		$ 860.68	$ 860.68
The Railroad Credit Corporation		1,033.97	1,033.97
Manistee Salt Works		1,000.00	1,000.00
Manistee Salt Works		1,000.00	1,000.00
Total			$ 2,894.65

EXHIBIT C-15—Continued

Securities Owned by Wholly-Owned Non-Carrier Subsidiary:
Schedule B

The Lake Erie Coal Company, Limited:				
Investments in Listed Securities:				Book Value Canadian Funds
Dominion of Canada	Victory Loan Bonds, 3%, due June 15, 1951	$ 10,000.00	$ 10,000.00	$ 10,000.00
	Second War Loan Bonds, 3%, due October 1, 1952	50,000.00	50,000.00	49,375.00
	Second Victory Loan Bonds, 3%, due March 1, 1954	25,000.00	25,000.00	25,000.00
	Third Victory Loan Bonds, 3%, due November 1, 1956	25,000.00	25,000.00	25,000.00
	Fourth Victory Loan Bonds, 3%, due May 1, 1957	25,000.00	25,000.00	25,000.00
	Fifth Victory Loan Bonds, 3%, due January 1, 1959	25,000.00	25,000.00	25,000.00
	Sixth Victory Loan Bonds, 3%, due June 1, 1960	15,000.00	15,000.00	15,000.00
	Eighth Victory Loan Bonds, 3%, due October 1, 1963	25,000.00	25,000.00	25,000.00
	Total			$ 199,375.00
Miscellaneous Investments:				
The Lake Erie Navigation Company, Limited, Common Stock		400	$ 40,000.00	$ 1.00
Other				1,389.25
	Total			$ 1,390.25
	Grand Total			$ 200,765.25

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Exhibit C–16

Market Prices of Stocks of The Chesapeake and Ohio Railway Company and Pere Marquette Railway Company

	Chesapeake Common		Pere Marquette Prior Preference		Pere Marquette Preferred		Pere Marquette Common	
Quarter ended	High	Low	High	Low	High	Low	High	Low
Mar. 31, 1944	48	44 3/8	69	54 1/2	46 7/8	33 3/4	15 3/4	10 1/4
June 30, 1944	46 1/2	44	75	61 1/2	47 7/8	40 1/2	14 3/4	11 3/4
Sept. 30, 1944	47 1/2	45 1/8	88 5/8	71 1/4	59 3/8	42 1/2	17 7/8	13 1/2
Dec. 31, 1944	50 5/8	46	96	76	65 1/4	46 3/4	19 7/8	14
Mar. 31, 1945	54 5/8	47 5/8	106 1/4	92 1/2	90	63	25 3/8	19 1/4
June 30, 1945	53 7/8	49	117 1/2	105 1/4	116 1/2	85 3/4	43 3/8	26 1/8
Sept. 30, 1945	56 1/4	48 3/8	115	102	107 3/4	85 1/2	39 1/2	26 3/8
Dec. 31, 1945	58 5/8	54 5/8	119 3/4	108 7/8	97	89	30 1/2	25 1/2
Month of								
January, 1946	60 1/4	54 7/8	117 1/2	111 3/4	97	88 1/2	36 3/4	26 1/2
February, 1946	63 3/8	55 1/2	120	115	98	91 1/2	32	26 1/4
March 1 to 15, 1946	59 1/4	55 3/4	125	120	98 1/2	96	27 1/2	25

Exhibit C–17

Statement Showing Details of Proposed Issue and Exchange of Capital Stock of The Chesapeake and Ohio Railway Company for Capital Stock of Pere Marquette Railway Company

Pere Marquette	Outstanding Shares		Stock to be Issued by Chesapeake							
			Ratios		Shares		Par Value		Amount	
Prior Preference	Preferred	Common	Preferred	Common	Preferred	Common	Preferred	Common	Preferred	Common
Stock	111,999(1)		1.00	.333	111,999	37,333	$100		$11,199,900	$ 933,325
Preferred Stock	124,288(2)		.80	.40	99,430.4	49,715.2	$100		$ 9,943,040	$ 1,242,880
Common Stock		450,448(3)		.50		225,224		$25		$ 5,630,600
Total Stock to be issued in exchange for stock of Pere Marquette					211,429.4	312,272.2			$21,142,940	$ 7,806,805
Total Stock of Chesapeake presently outstanding		7,657,354(4)				7,657,354				$191,433,850
Par Value of Stock of Chesapeake to be outstanding after proposed merger									$21,142,940	$199,240,655
Total Par Value of Stock of Chesapeake to be outstanding after proposed merger										$220,383,595

(1) Not giving effect to voting trust scrip certificates issued in connection with a prior reorganization representing fractional interests equal to one share.

(2) Not giving effect to voting trust scrip certificates representing fractional interests equal to one share and one share held in the treasury of Pere Marquette.

(3) Not giving effect to voting trust scrip certificates representing fractional interests equal to one share and eleven shares held in the treasury of Pere Marquette.

(4) Not including one share held in treasury and $69.44 scrip presently outstanding.

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EXHIBIT C–18

Securities of Chesapeake, Pere Marquette, and Alleghany Corporation Beneficially Owned by the Officers and Directors of the Company and of Pere Marquette and by Their Associates

	Chesapeake and Ohio	Pere Marquette Railway Company			Alleghany Corporation		
	Common	Prior Preference	Preferred	Common	Common	Series A Preferred	Prior Preferred
Leonard B. Allen, Vice-President C&O	50	—	—	—	—	—	—
J. Fred Andrews, Comptroller C&O & PM	—	—	—	—	—	—	—
Associate—Note 1	160	—	—	—	—	—	—
Leonard P. Ayres, Director C&O	400	—	—	—	—	10	—
Associate—Notes 2 and 3	—	—	—	—	—	—	—
James G. Blaine, Director C&O	10	—	—	—	—	—	—
Robert J. Bowman, President PM, Director C&O & PM	151	500	700	1,000	—	—	—
Associate	151	—	50	—	—	—	—
Robert J. Bulkley, Director PM	—	—	—	10	—	—	—
Associate	100	—	—	—	—	—	—
James E. Davidson, Director PM	—	—	—	100	—	—	—
John E. Dwyer, Director PM	—	—	—	100	—	—	—
Cyrus S. Eaton, Director C&O	100	—	—	—	—	—	—
Howell B. Erminger, Jr., Director C&O & PM	200	100	50	10	—	—	—
*Associates	32,460	—	—	—	—	—	—
Herbert Fitzpatrick, Director C&O	116	—	—	100	—	—	—
Harvey D. Gibson, Director C&O	100	—	—	—	—	—	—
Associate	5,500	—	—	—	—	—	—
John L. Giles, Director PM	—	—	—	25	—	—	—
Henry J. Guild, Director C&O	5	—	—	—	100	—	—
Allan P. Kirby, Director C&O	100	10	—	—	500,000	39,158	—
Associates—Note 2	7,600	—	—	—	—	—	—
William H. Lipscomb, Director C&O	100	—	—	—	—	—	—
Henry F. Lohmeyer, Secretary and Treasurer C&O & PM	244	20	25	—	—	—	—
Associate	29	—	—	—	—	—	—
Wilbur C. Manning, Director PM	—	10	1	—	—	—	—
Ross S. Marshall, Vice-President C&O & PM, Director PM	100	—	—	100	—	—	—
Associate	100	—	—	—	—	—	—
Walter S. McLucas, Director PM	—	10	—	—	—	—	—
James D. Miller, Director PM	—	—	—	100	—	—	—
Associates	150	—	—	—	—	—	—

EXHIBIT C-18—Continued

Securities of Chesapeake, Pere Marquette, and Alleghany Corporation Beneficially Owned by the Officers and Directors of the Company and of Pere Marquette and by Their Associates

	Chesapeake and Ohio	Pere Marquette Railway Company			Alleghany Corporation		
	Common	Prior Preference	Preferred	Common	Common	Series A Preferred	Prior Preferred
Otto Miller, Director PM	—	—	—	10	—	—	—
Associates	900	—	—	—	—	—	—
Carl E. Newton, President and Director C&O	10	—	—	—	—	—	—
John J. O'Laughlin, Director PM	—	10	—	—	—	100	—
John B. Parrish, Vice-President C&O	300	—	—	—	—	—	
Associate	100	—	—	—	—		—
Robert W. Purcell, Vice-President and Director C&O—Note 2	10	—	—	—	1,100	900	—
DeGrimm Renfrew, Director PM	—	—	—	10	—	—	—
H. Dudley Swim, Director PM	—	100	300	—	—	100	—
Associate	—	—	—	—	1,000	—	—
Edward M. Thomas, Vice-President C&O & PM	—	—	—	—	—	—	—
Associate	150	—	—	—	—	—	—
Harry C. Thompson, Director C&O	10	—	—	—	—	—	—
Associate	30	—	—	—	100	—	—
Walter J. Tuohy, Vice-President C&O	—	—	—	—	—	—	—
Associate	—	—	—	—	—	100	—
Andrew Van Pelt, Director C&O	250	—	—	—	—	800	—
Associate	—	—	—	—	—	1,000	—
Robert R. Young, Chairman of Board and Director C&O—Note 2	110	—	—	—	47,106	5,983	6,200
Associate	—	—	—	—	—	2,700	—

* In addition, Mr. Erminger is agent for the Executive Committee of a trust owning 3,000 shares of Chesapeake and Ohio common stock and is attorney-in-fact for persons owning 27,075 shares of Chesapeake and Ohio common stock.

NOTE. 1—The associate of Mr. Andrews holds $5,000 principal amount Pere Marquette Railway Company First Mortgage 3⅜ Per Cent. Bonds, Series D.

NOTE 2—In addition to the holdings listed above, Alleghany Corporation, an associate of Messrs. Ayres, Kirby, Purcell, and Young, beneficially owned 606,634 shares of the common stock of the Chesapeake and Ohio, as explained in the text.

NOTE 3—The Associate of Mr. Ayres holds $500,000 principal amount of The Chesapeake and Ohio Railway Company Refunding and Improvement Mortgage Bonds, consisting of $100,000 each of Series G-6, Series G-7, Series G-8, Series G-9, and Series G-10.

[fol. 126] EXHIBIT D

Excerpts from Sections 3822-a and 3822-b of the Code of Virginia of 1919, as Amended

Sec. 3822-a. Remedy of Dissatisfied Stockholders.—(a) If any stockholder of either of the corporations so consolidated or merged who has not given assent thereto and who is dissatisfied therewith, signifies his dissent by notice in writing served on the president, secretary or treasurer, either within or without this State, of the consolidated or merged corporation, or on the statutory agent thereof, if such agent has been appointed, at any time within three months after the date of the meeting of his corporation to act on the consolidation or merger agreement, he shall be entitled to receive from the consolidated or merged corporation the fair cash value of his stock as of the day before the vote for the agreement of consolidation or merger of his corporation was so cast as aforesaid, which fair cash value if not agreed on between the dissenting stockholder and the consolidated or merged corporation shall be determined in the manner hereinafter provided; and if any stockholder who has not given assent thereto fails to signify his dissent by notice in writing served upon the consolidated or merged corporation in the manner hereinafter directed within three months after the date of the meeting of his corporation, he shall be forever precluded from objecting to the consolidation or merger and shall be deemed to have elected thereby to participate in the agreement or plan of consolidation or merger on the basis therein provided for stockholders of his class, and such stockholder shall not thereafter be entitled to demand or receive the fair cash value of his stock in his corporation, but his rights shall thereafter be confined to participation in the agreement or plan of consolidation or merger, and to the stock of the consolidated or merged corporation to which he is entitled, and all of his rights under the stock of his consolidating or merging corporation shall thereupon cease and determine.

(b) If such dissenting stockholder and the merged or consolidated corporation do not, within one month from the date of the service of the notice by him upon the merged or consolidated corporation, agree upon the fair cash value of his stock as of the day before the vote for the agreement

of consolidation or merger was cast, he may, upon reasonable notice to the consolidated or merged corporation given in the manner in which the notice of his dissent is hereinbefore directed to be given, apply to the circuit court of the county or the circuit or corporation court of the city wherein the principal office of the corporation of the dissenting stockholder is located, or to the judge thereof in vacation, or to the chancery court of the city of Richmond, or to the judge in vacation, in the event the principal office of his corporation is located in the city of Richmond, to have the fair cash value of his stock, as of the date aforesaid, appraised by three disinterested persons, residents of this State, appointed by the court; or the consolidated or merged corporation may likewise, upon reasonable notice to such dissenting stockholder, either served upon him personally or sent to him by registered mail at his last known postoffice address, as same appears on the books of the corporation, apply to such court or the judge in vacation to have the fair cash value of the stock of the dissenting stockholder, as of the date aforesaid, appraised by three disinterested persons, residents of this State, appointed by the court; and it shall be the duty of the court, or judge in vacation, to appoint the appraisers on reasonable notice, on the application of either party; provided that if notice of the consolidated or merged corporation to apply to the court for the appointment of appraisers is not served upon such stockholder within this State, and if such stockholder does not appear before the court on the day fixed in the notice the petition or application of the consolidated or merged corporation for the appointment of appraisers to appraise and determine the fair cash value of the stock shall be continued to such time as the court designates, and an order of publication shall be entered against him requiring him to appear before the court or the judge in vacation at such time and place as designated in the order, which order shall be published once a week for two successive weeks in a newspaper published or having a general circulation in the county or city in which the proceeding is pending; and upon the day fixed in the order, or at any subsequent time to which the matter is continued, whether the stockholder has appeared or not, the court shall appoint three disinterested persons, residents of this State, to appear and determine the fair cash value of the stock.

(c) The appraisers so appointed shall investigate the condition of the corporation of the dissenting stockholder, and report to the court or to the judge in vacation as promptly as possible the fair cash value of the stock of [fol. 127] the dissenting stockholder as of the day before the vote for the agreement of consolidation or merger of his corporation was so cast as aforesaid, and the appraisers shall have the right to administer oaths and to take such evidence as is necessary in determining the value of the stock, and may conduct their proceedings either within or without the State of Virginia; provided that the appraisers shall give notice of the time and place of their first meeting to the dissenting stockholder and to the consolidated or merged corporation at their last known postoffice address, by registered mail at least ten days before the date of the meeting, and thereafter no notice of adjournment, if any, either from time to time, or from place to place, to either party shall be necessary. The court in which such proceedings are pending, or the judge in vacation, may order production before the appraisers at such time and place as specified of all such books and accounts and other records of the corporation of the dissatisfied stockholder, or of the consolidated or merged corporation, as necessary or desirable in determining the value. The finding of a majority of the appraisers shall stand as the action of the appraisers. The appraisers shall make their report to the court or to the judge in vacation, in writing, and shall return with their report such evidence as they have taken during their investigation.

(d) If such stockholder, or the consolidated or merged corporation, be dissatisfied with the fair cash value as determined by the appraisers, he or it, as the case may be, may, within thirty days from the date the report of the appraisers is filed in court, or with the judge in vacation, and upon reasonable notice to the other party given in the manner hereinbefore provided, except that no further order of publication shall be necessary as to such dissenting stockholder, apply to the court or the judge in vacation to set aside the finding of the appraisers; and the court or judge if of the opinion that the valuation is just shall deny the application and, after thirty days from the date the report of the appraisers was filed, shall confirm same and the amount

thereof, but if the court or judge be of opinion that the valuation is not just, the report and the amount thereof shall be set aside, and when set aside the court or judge shall proceed to ascertain the fair cash value of the stock of such stockholder, as of the day aforesaid, and shall enter judgment against the consolidated or merged corporation accordingly, which judgment may be collected as other judgments of a court of competent jurisdiction are collectible, and its finding and judgment shall be final and conclusive upon all parties to the proceedings; and if no such application is made within thirty days after the report is filed, the court or judge shall immediately confirm the report, and the amount thereof shall be final and conclusive upon all parties to the proceeding. In any case in which the report of the appraisers is confirmed as hereinbefore directed the amount thereof shall immediately become and be a final judgment of the court against the consolidated or merged corporation and may be collected as other judgments of a court of competent jurisdiction are by law collectible.

(e) Upon payment or tender of payment by the consolidated or merged corporation of the value of the stock so ascertained, the dissenting stockholder shall deliver up his certificate of stock to the consolidated or merged corporation, if any has been issued, and if none has been issued shall make a due assignment to the consolidated or merged corporation of all his rights in respect thereto and shall mark the judgment satisfied, and the consolidated or merged corporation may thereafter issue and dispose of the stock to which the dissenting stockholder would have been entitled under the agreement of consolidation or merger had he not dissented therefrom; and if the dissenting stockholder refuses to receive the value so ascertained when payment is tendered to him or refuses or fails to surrender and deliver up his certificate of stock upon the tender of payment, or refuses or fails to mark the judgment satisfied, the consolidated or merged corporation shall have the right to deposit to the credit of the court in which the proceeding is pending the value of the stock so ascertained and determined, and the court or judge shall enter an order reciting the deposit and declaring the judgment satisfied and discharging the consolidated or merged corporation from any or all further liability thereunder, and shall direct

the clerk of the court to mark the judgment satisfied. Thereafter the rights of the stockholder under his stock in the consolidating or merging corporation shall cease and determine and his sole right shall be to receive the cash so deposited upon surrender to the consolidated or merged corporation of the certificate or certificates representing same if any were issued to him, and the consolidated or merged corporation may issue and dispose of the stock to which the dissenting stockholder would have been entitled under the agreement of consolidation or merger had he not dissented therefrom.

[fol. 128] (f) The court or judge may in the same proceeding, upon application of the consolidated or merged corporation, enjoin the sale, negotiation or other disposition of the stock certificate or certificates held by the stockholder and may compel their surrender by him with appropriate endorsement to the consolidated or merged corporation.

(g) The appraisers appointed pursuant to this section shall receive such compensation as is allowed to them by the court in the order making the appointments and their reasonable expenses incurred in connection with their investigation, to be paid by the consolidated or merged corporation.

(h) In all cases when statutes of this State now in force and effect authorize the union or consolidation and merger of the stock, property and franchises of any corporation of this or any other State with and into the stock, property and franchises of any other corporation or corporations of this or any other State, and provide that such union or consolidation and merger shall be taken and deemed complete so soon as the agreement thereof is filed in the office of the board of public works, such agreement shall be filed in the office of the Commission, and when so filed shall have the same force and effect as if same had been filed in the office of the board of public works. (1902-3-4, p. 437, ch. 5, sec. 41; 1922, p. 625; 1944, p. 529.)

Section 3822-b. Filing Agreement after three months from meeting.—An agreement of merger or consolidation may provide that notice of dissent by any stockholder shall

be served on the president, secretary or treasurer, either within or without the State, of his corporation, or on the statutory agent thereof, if such agent has been appointed, at any time within three months after the date of the meeting of the stockholders of his corporation to act on the agreement, without awaiting the consummation of the merger or consolidation. In such case notices of dissent shall be so served and when so served shall be valid for all purposes and the boards of directors of the several corporations need not present the agreement to the Commission until the expiration of the period for dissent provided in Section 3822-a and such boards of directors may be authorized by the stockholders to terminate the agreement in lieu of presenting it to the Commission if of the opinion that the merger or consolidation is, in all the circumstances, including the dissents, impracticable or undesirable.

[fol. 129] IN UNITED STATES DISTRICT COURT

MOTION FOR LEAVE TO INTERVENE AND NOTICE OF MOTION—Filed in Open Court June 4, 1947

The Chesapeake and Ohio Railway Company, a Virginia corporation, Pere Marquette Railway Company, a Michigan corporation, and Alleghany Corporation, a Maryland corporation, hereby move the Court for leave to intervene as Defendants in this action in opposition to the relief sought in the Petition and at the same time to file the attached Motion to Dismiss the action. Said Companies were parties in interest to the proceeding before the Commission in which the order referred to in the Petition was made; their interest is involved in this proceeding; and they are entitled to appear as parties hereto on their own motion and as of right pursuant to Sections 212 and 213 of the Judicial Code, as amended (28 U.S.C., Section 45a).

Dated at Richmond, Virginia, June 3, 1947.

R. W. Purcell, J. C. Kauffman, R. F. Maskey, Geo. H. Gardner, George D. Gibson (S.), John W. Riely, Attorneys for The Chesapeake and Ohio Railway Company and Alleghany Corporation; John C. Shields, Glenn C. Wilber, George D. Gibson (S.), Attorneys for Pere Marquette Railway Company.

Hunton, Williams, Anderson, Gay & Moore, Electric Building, Richmond 12, Virginia. Of Counsel.

[fol. 130] To The Attorney General of the United States, Washington, D. C.; Interstate Commerce Commission, Washington, D. C.; Oscar L. Shewmake, 1203 State-Planters Bank Building, Richmond 19, Virginia; Robert N. Cooper, 1302 18th St. N.W., Washington 6, D.C. *Counsel for Plaintiffs.*

Please Take Notice that The Chesapeake and Ohio Railway Company, Pere Marquette Railway Company and Alleghany Corporation will bring the foregoing Motion for Leave to Intervene in this proceeding and the Motion to Dismiss which is thereto attached on for hearing before the District Court of the United States for the Eastern District of Virginia, Richmond Division, at the court room in the Post Office Building in Alexandria, Virginia, on the 4th

day of June, 1947, at 2:30 o'clock in the afternoon or as soon thereafter as counsel may be heard.

Dated at Richmond, Virginia, this 3rd day of June, 1947.

(S) George D. Gibson, Attorney for The Chesapeake and Ohio Railway Company, Pere Marquette Railway Company and Alleghany Corporation.

Hunton, Williams, Anderson, Gay & Moore, Electric Building, Richmond 12, Virginia.

[fol. 131] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed in open Court June 4, 1947

The Chesapeake and Ohio Railway Company, Pere Marquette Railway Company and Alleghany Corporation move the Court to dismiss the action because the Petition fails to state a claim upon which relief can be granted and because the action of the Interstate Commerce Commission complained of in the Petition is within its powers, is based on substantial evidence and is in accord with legal powers, is based on substantial evidence and is in accord with legal standards and is therefore conclusive.

Dated at Richmond, Virginia, June 3, 1947.

R. W. Purcell, J. C. Kauffman, R. F. Maskey, Geo. H. Gardner, George D. Gibson (S.) George D. Gibson, John W. Riely, Attorneys for The Chesapeake and Ohio Railway Company and Alleghany Corporation.

John C. Shields, Glenn C. Wilber, George D. Gibson (S.) George D. Gibson, Attorneys for Pere Marquette Railway Company.

Hunton, Williams, Anderson, Gay & Moore, Electric Building, Richmond 12, Virginia; of Counsel.

[fol. 132] IN UNITED STATES DISTRICT COURT

ORDER GRANTING MOTION TO INTERVENE—Entered and Filed June 4, 1947

[Title omitted]

The motion of The Chesapeake and Ohio Railway Company, Pere Marquette Railway Company and Alleghany Corporation for leave to intervene as parties defendant in this proceeding having come on this day for hearing; and it appearing to the Court that The Chesapeake and Ohio Railway Company, Pere Marquette Railway Company and Alleghany Corporation were parties in interest to the proceeding before the Commission in which the order referred to in the petition herein was made and their interest is involved in this proceeding and that they are therefore entitled to appear as parties hereto on their own motion and as of right, pursuant to Sections 212 and 213 of the Judicial Code, as amended (28 U. S. C., Section 45a); and the Court being fully advised in the premises;

It Is Ordered that the motion of The Chesapeake and Ohio Railway Company, Pere Marquette Railway Company and Alleghany Corporation for leave to intervene in this proceeding be, and it hereby is, granted, and they are hereby made parties defendant to this proceeding, and are hereby granted leave to file their Motion to Dismiss.

(Sgd.) Armistead M. Dobie, U. S. Circuit Judge.

Dated: June 4, 1947.

[fol. 133] IN UNITED STATES DISTRICT COURT

MOTION OF HERBERT G. WELLINGTON, ET. AL., FOR LEAVE TO INTERVENE—Filed in Open Court June 4, 1947

Come now Herbert G. Wellington, Raymond B. Haynes and Herbert G. Wellington, Jr., a co-partnership, doing business as Wellington & Company, of 120 Broadway, New York City; Louis F. Rothschild, Leonard A. Hockstader, Charles Newwirth, Henry C. Schreier, Willard E. Loeb, Henry L. Heming, Albert F. Hockstader, Paul M. Kaufmann, Henry A. Cohn, Eugene Treuhold, Henry J. Dietrich,

and Thomas H. Hockstader, a co-partnership, doing business as L. F. Rothschild & Company, of 120 Broadway, New York City; Herbert Salomon, Percy F. Salomon, B. J. Levy, Rudolph Smutny, Edward L. Holsten, H. I. Losee, Betram F. Brummer, Jonas H. Ottens, Franklin J. Grieder, James H. Carson, L. Eugene Marx, Myles D. Perrin, Theodore A. Von Glahn, Henry S. Ludeman, Girard L. Spencer, William R. Salomon, Maurice Levy, Leo G. Shaw, and Charles J. Simon, a co-partnership, doing business as Salomon Brothers and Hutzler, of 60 Wall Street, New York City; Nicholas J. Gerold, Bernard E. Pollak, Cornelius R. Love, Jr., Audrey Josephthal Love, Andrew Baird, Edward A. Rosenthal, James S. Wilson, and Mortimer J. Gartman, a co-partnership, doing business as Josephthal & Company, of 120 Broadway, New York City; Walter E. Sachs, Henry S. Bowers, Howard J. Sachs, Sidney J. Weinberg, Ernest [fol. 134] Loveman, Miles J. Cruickshank, Robert V. Horton, Alfred E. Hammill, James C. Hemphill, Walter F. Blaine, T. Spencer Shore, Gustave L. Levy, and Walter J. Creely, a co-partnership, doing business as Goldman, Sachs & Co., of 30 Pine Street, New York City; and Blyth & Co., Inc., a corporation of New York, of 14 Wall Street, New York City, and move for leave to intervene as defendants in this action in order to assert the defenses set forth in their proposed answer, a copy of which is attached hereto, on the following grounds:

I

That this is an action to enjoin, set aside, annul or suspend, in whole or in part, an order of the Interstate Commerce Commission made in a proceeding before said Commission upon the application of the Chesapeake & Ohio Railway Company, the Pere Marquette Railway Company, and the Alleghany Corporation for authorization and approval under the Interstate Commerce Act, as amended, of a transaction for the merger of the properties and franchises of the Pere Marquette Railway Company into the Chesapeake & Ohio Railway Company for ownership, management and operation. Said suit involves the validity of said order. Your petitioners respectfully represent that, respectively, they are the owners of the shares of preferred and common stock of the Pere Marquette Railway Company as set out below, and as such owners, have assented to the

proposed merger of the properties of the said Railway Company pursuant to the terms and conditions of said order:

	5% Cumulative Prior Preference	5% Cumulative Preferred	Common
Wellington & Company	675	5,250	1,000
L. F. Rothschild & Company	100	1,400	
Salomon Bros. & Hutzler	705	5,460	1,000
Josephthal & Company	100	1,400	
Goldman, Sachs & Co.	1,200	1,900	200
Blyth & Co., Inc.	500	7,200	
Total	3,280	22,610	2,200

[fol. 135] Your petitioners further represent that under the terms of the agreement therefor, the merger of the property will be consummated on June 5, 1947, on which date, pursuant to the terms of said order, they will be entitled to receive certain shares of the preferred and common stock of the Chesapeake & Ohio Railway Company, and particularly 11,237 shares of the common stock of the said last named Railway Company; that such Chesapeake & Ohio Railway Company has declared and is obligated to pay and will pay, on June 6, 1947, to the stockholders of record on that date, a dividend of 75 cents upon each and every share of said common stock of the said Chesapeake & Ohio Railway Company, including the said 11,237 shares of such common stock to be received by your petitioners in exchange for their present shares of preferred and common stock of the Pere Marquette Railway Company. The dividends upon said common stock of the Chesapeake & Ohio Railway Company payable to your petitioners amount to $8,427.75, and to all present holders of preferred and common stocks of the Pere Marquette Railway Company, to $234,209.25.

Your petitioners further aver that if said order of the Interstate Commerce Commission is temporarily enjoined and thereby the consummation of the merger therein authorized enjoined, your petitioners and other holders of the preferred and common stocks of the Pere Marquette Railway Company, assenting to said merger, will be irreparably injured in that they will be deprived, permanently, of the dividends declared and to be paid to stockholders of record of the Chesapeake & Ohio Railway Company on June 6, 1947, upon common stock of that company

receivable for such stocks of the Pere Marquette Railway Company.

[fol. 136] II

This petition to intervene is made as a matter of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, and Section 45(a) of Title 28 of the United States Code.

John R. Turney, Attorney for Petitioners-Interveners, Office and Post Office Address: 1001 Fifteenth Street, Northwest, Washington 5, D. C.

Duly sworn to by Lester S. Greenwald, jurat omitted in printing.

[fol. 137] NOTICE OF MOTION

To: Oscar L. Shewmake, Esq., and Rupert M. Cooper, Attorneys for Plaintiffs; Tom C. Clark, Esq., United States Attorney General; David Kunkel, Esq., Attorney for Interstate Commerce Commission.

Please Take Notice, That the undersigned will bring the above motion on for hearing before this Court in the United States Court House at Alexandria, Virginia, on the 4th day of June, 1947, at 2:30 P. M., Eastern Standard Time, or as soon thereafter as counsel can be heard.

Dated: June 4, 1947.

John R. Turney, Attorney for Petitioners-Interveners, Office and Post Office Address: 1001 Fifteenth Street, Northwest, Washington 5, D. C.

[fol. 138] IN UNITED STATES DISTRICT COURT

ANSWER OF HERBERT G. WELLINGTON, et al.—Filed in Open Court June 4, 1947

Come now defendants and interveners, Herbert G. Wellington, Raymond B. Haynes and Herbert G. Wellington, Jr., a co-partnership, doing business as Wellington & Company, of 120 Broadway, New York City; Louis F. Rothschild, Leonard A. Hockstader, Charles Newwirth, Henry C. Schreier, Willard E. Loeb, Henry L. Heming, Albert F. Hockstader, Paul M. Kaufmann, Henry A. Cohn, Eugene

Treuhold, Henry J. Dietrich, and Thomas H. Hockstader, a co-partnership, doing business as L. F. Rothschild & Company, of 120 Broadway, New York City; Herbert Salomon, Percy F. Salomon, B. J. Levy, Rudolph Smutny, Edward L. Holsten, H. I. Losee, Bertram F. Brummer, Jonas H. Ottens, Franklin J. Grieder, James H. Carson, L. Eugene Marx, Myles D. Perrin, Theodore A. Von Glahn, Henry S. Ludeman, Girard L. Spencer, William R. Saloman, Maurice Levy, Leo G. Shaw, and Charles J. Simon, a co-partnership, doing business as Salomon Brothers and Hutzler, of 60 Wall Street, New York City; Nicholas J. Gerold, Bernard E. Pollak, Cornelius R. Love, Jr., Audrey Josephthal Love, Andrew Baird, Edward A. Rosenthal, James S. Wilson, and Mortimer J. Gartman, a co-partnership, doing business as Josephthal & Company, of 120 Broadway, New York City; Walter E. Sachs, Henry S. Bowers, Howard J. Sachs, [fol. 139] Sidney J. Weinberg, Ernest Loveman, Miles J. Cruickshank, Robert V. Horton, Alfred E. Hammill, James C. Hemphill, Walter F. Blaine, T. Spencer Shore, Gustave L. Levy, and Walter J. Creely, a co-partnership, doing business as Goldman, Sachs & Company, of 30 Pine Street, New York City; and Blyth & Co., Inc., a corporation of New York, of 14 Wall Street, New York City; and for their joint and several answer to said complaint:

I

Defendant-Interveners deny:

1. The allegations of sub-paragraph 4 of paragraph II of the complaint that in the report of the Interstate Commerce Commission, the rights of dissenting stockholders were ignored or that no conditions were attached to the approval requiring applicants to protect the rights of plaintiffs or others in the same position;

2. The allegations of sub-paragraph 6 of paragraph II, that (a) failure to include protection for plaintiffs, as dissenting stockholders as a distinct class created by the merger, is contrary to law or in violation of the Commission's duty to impose just and reasonable conditions for the protection of all interests concerned; or (b) the Commission, in this or in any other regard, has departed from any past practice of requiring that merger agreements contain

either provisions for the protection of dissenting shareholders or conditions approved for a similar purpose; or (c) the decision and order of the Commission affords no affirmative protection; or (d) the decision relegates plaintiffs, as dissenting shareholders, to negotiation and litigation in the courts; or (e) the decision and order of the Commission or any action taken by the Commission or to be taken pursuant to such decision and order is without warrant of law;

[fol. 140] 3. The allegations of sub-paragraph 7 of paragraph II, that (a) plaintiffs have suffered or will suffer substantial or irreparable damage by reason of the failure of the Commission to recognize and protect their rights under the Interstate Commerce Act, as amended; or (b) there has been or is any failure of the Commission to recognize and protect such rights; or (c) the Commission refuses to require applicants to offer plaintiffs any protection or fails to condition its approval of the merger agreement upon a protection of plaintiffs' rights; or (d) the plaintiffs are without remedy unless this Court grant the relief sought;

4. The allegations of paragraph III that (a) plaintiffs will suffer irreparable or other damage either in connection with the Commission or will lose any remedy provided under the Interstate Commerce Act, as amended, unless this Court, by temporary stay or suspension of the order of the Commission, enjoin or restrain the enforcement of such order pending final determination of this action; or (b) any right of plaintiffs will be lost unless this Court enjoin or suspend or stay the order of the Commission; or (c) once the merger agreement has been consummated, this Court will be powerless to correct any unlawful action on the part of the Commission.

II

For further answer, Defendant-Interveners show the Court that:

1. They are owners of the shares of preferred and common stock of the Pere Marquette Railway Company, and as such owners, have assented to the proposed merger of

the properties of the said Railway Company pursuant to the terms and conditions of said order, as follows:

	5% Cumulative Prior Preference	5% Cumulative Preferred	Common
Wellington & Company	675	5,250	1,000
L. F. Rothschild & Company	100	1,400	
Salomon Bros. & Hutzler	705	5,460	1,000
Josephthal & Company	100	1,400	
Goldman, Sachs & Co.	1,200	1,900	200
Blyth & Co., Inc.	500	7,200	
Total	3,280	22,610	2,200

[fol. 141] 2. Under the terms of the agreement therefor, the merger of the properties will be consummated on June 5, 1947, on which date, pursuant to the terms of said order, they will be entitled to receive, in exchange for their above shares of Pere Marquette Railway Company stock, certain shares of the preferred and common stock of the Chesapeake & Ohio Railway Company, including 11,237 shares of the common stock of the said last named Railway Company; such Chesapeake & Ohio Railway Company has declared and is obligated to pay and will pay, on June 6, 1947, to stockholders of record on that date, a dividend of 75 cents upon each and every share of said common stock of the said Chesapeake & Ohio Railway Company, including the said 11,237 shares of such common stock to be so received by your Defendant-Interveners;

3. The dividends upon said common stock of the Chesapeake & Ohio Railway Company, which are payable to your Defendant-Interveners, amount to $8,427.75, and the dividends payable to all present holders of preferred and common stocks of the Pere Marquette Railway Company aggregate $234,209.25;

4. If said order of the Interstate Commerce Commission is enjoined, stayed or suspended, and thereby consummation of the merger therein authorized delayed, your Defendant-Interveners and other holders of the preferred and common stocks of the Pere Marquette Railway Company, assenting to the said merger, will be irreparably injured in that they will be deprived, permanently, of the dividends declared and to be paid to stockholders of record of the Chesapeake & Ohio Railway Company on June 6, 1947,

upon common stock of that company receivable for such stocks of the Pere Marquette Railway Company, in amounts as aforesaid.

[fol. 142] Wherefore, Defendant-Interveners pray that the complaint herein be dismissed for want of equity and the prayer for injunction or stay or postponement of the Commission's order be denied; or in the alternative, that as a condition of the issuance of any injunction, stay or restraining order enjoining or preventing consummation of said merger on June 5, 1947, that Plaintiffs be required to make and file with the Court a bond with good and sufficient security, in an amount of not less than Two Hundred and Fifty Thousand Dollars ($250,000), conditioned to pay all damage suffered by the Defendant-Interveners and any and all other holders of preferred or common stocks of the Pere Marquette Railway Company by reason of the issuance of said injunction, stay or postponement; and for such other and further relief as they may be entitled in the premises.

Dated this 4th day of June, 1947.

John R. Turney, Attorney for Defendant-Interveners, Office and Post Office Address: 1001 Fifteenth Street, N. W., Washington 5, D. C.

[fol. 143] *Duly sworn to by Lester S. Greenwald, jurat omitted in printing.*

[fol. 144] In United States District Court

Motion to Intervene—Filed June 4, 1947

Your petitioners (1) Sterling Grace & Company, New York, N. Y., in behalf of themselves and their customers and clients owning 3,585 shares of common stock, 10,285 shares of preferred stock and 2,205 shares of prior preferred stock of the Pere Marquette Railway Company; (2) The Connecticut Mutual Life Insurance Company, Hartford, Connecticut, owning 5,000 shares of prior preferred stock, and (3) Keystone Custodian Funds, owning 5,500 shares of prior preferred stock and 830 shares of preferred, move for leave to intervene as defendants in this action in order to assert the defenses set forth in their proposed motion, a copy of which is hereto attached, on the ground that they are independent stockholders of the Pere Marquette Rail-

way Company, and as such have a defense to plaintiff's claim presenting both questions of law and fact common to the main action. In further support of said motion, your petitioners respectfully say:

Petitioners as independent stockholders of the Pere Marquette Railway have a vital interest in the early consummation of the merger approved and authorized by the Interstate Commerce Commission in its Report and Order of April 1, 1947, in Finance Docket No. 15288, of the properties and franchises of the Pere Marquette Railway Company into the Chesapeake and Ohio Railway Company for ownership, management and operation, on terms which are just and reasonable.

Wherefore, said petitioners pray leave to intervene and be treated as parties hereto with the right to have notice of and appear at the taking of testimony, produce and cross examine witnesses, and be heard in person, or by counsel upon brief and at the oral argument, if oral argument is granted.

[fol. 145] Dated at Washington, D. C., this 4th day of June, 1947.

Respectfully submitted, (Sgd.) Moultrie Hitt, Attorney for Sterling Grace & Company, Connecticut Mutual Life Insurance Co., Keystone Custodian Funds.

[fol. 146] In United States District Court

Motion to Dismiss—Filed June 4, 1947

(1) Sterling Grace Company, (2) Connecticut Mutual Life Insurance Company, (3) Keystone Custodian Funds, independent shareholders of the Pere Marquette Railway Company, respectfully move the Court to dismiss this action because (1) terms and conditions of the Report and Order of the Interstate Commerce Commission of April 1, 1947, entitled "Finance Docket No. 15228, Pere Marquette Railway Company Merger, etc." are just and reasonable and fair to the stockholders of the Pere Marquette Railway Company; and (2) the petition of complainants fails to state a claim upon which relief can be granted; and (3) the action of the Interstate Commerce Commission complained

of is within the lawful powers of the Commission, is amply supported by substantial evidence and is in accord with legal standards.

Dated at Washington, D. C., this 4th day of June, 1947.

Respectfully submitted, (Sgd.) Moultrie Hitt, Attorney for Sterling Grace Company, Connecticut Mutual Life Insurance Co., Keystone Custodian Funds, 537 Woodward Building, Washington 5, D. C.

[fols. 147-150] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING STERLING GRACE & CO., ET AL., TO INTERVENE —Entered & Filed June 4, 1947

[Title omitted]

The motion of Sterling Grace & Company, Connecticut Mutual Life Insurance Company and Keystone Custodian Funds, for leave to intervene, as parties defendant in this proceeding having come on this day for hearing; and it appearing to the Court that a proper interest of said petitioners is involved in this proceeding;

It Is Ordered that the motion of Sterling Grace & Company, Connecticut Mutual Life Insurance Company and Keystone Custodian Funds for leave to intervene in this proceeding be, and hereby is, granted, and they are made parties defendant to this proceeding, and are hereby granted leave to file their motion to dismiss.

(Sgd.) Armistead M. Dobie, United States Circuit Judge.

Alexandria, Virginia, June 4th, 1947.

[fol. 151] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 713

ALBERT E. SCHWABACHER, and others,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

Reporter's Transcript of Proceedings

Before Honorable Armistead M. Dobie, United States Circuit Judge; Honorable Sterling Hutcheson, United States District Judge; Honorable A. D. Barksdale, United States District Judge

Alexandria, Virginia,
June 4, 1947.

Present: William M. Blackwell, Esq.; Robert M. Cooper, Esq.; Ashley Sellers, Esq., Counsel for the complainants; George R. Humrickhouse, Esq., Assistant United States Attorney; Edward J. Hickey, Jr., Esq., Special Assistant to the Attorney General, for the United States of America; Daniel H. Kunkel, Esq., Attorney for Interstate Commerce [fol. 152] Commission; J. C. Kauffman, Esq.; George H. Gardner, Esq.; George D. Gibson, Esq.; John H. Riely, Esq.; Counsel for The Chesapeake & Ohio Railway Company and Allegheny Corporation; John C. Shields, Esq.; George D. Gibson, Esq., Counsel for Pere Marquette Railway Co.; John R. Turney, Esq.; Moultrie Hitt, Esq., Counsel for intervening stockholders.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Gibson: May it please the Court, the applicants in this proceeding before the Commission were the Chesapeake & Ohio Railway Company, Pere Marquette Railway Company and Allegheny Corporation and in that capacity they have a statutory right to intervene in this proceeding. We respectfully ask leave to do so and we wish to file a motion to dismiss the petition herein. Copies have been served on opposing counsel.

I would also like to submit a proposed order.

The Court (Judge Dobie): Your motion to dismiss—is that on the merits? Is there any question of notice?

Mr. Gibson: The ground of the motion is, in substance, that there is no warrant in law for the action.

The Court (Judge Dobie): You gentlemen know that there is a provision for three days' notice before the temporary stay can be granted and five days' notice before any order can be entered on the merits. Are you gentlemen [fol. 153] willing to waive that notice?

Mr. Gibson: For the C. & O., Pere Marquette and Allegheny, we are. Of course there are other parties.

Mr. Hickey: Your Honors, speaking for the United States, we are willing to waive the notice if the Court does not regard the wording of Section 47 of 28 U. S. C. A. as going to its jurisdiction. It could be construed that way.

The Court (Judge Dobie): Do you know of any cases on that? I have sat in quite a number of these cases and I have never had any question of waiver. The statute is quite precise and, as you know, it prescribes in great detail and in connection with granting a temporary stay, if that is done, you have to make a special finding of irrevocable damage and there has to be some incorporation by reference in connection with the evidence. So the statute is pretty strict. I understand the three-day notice has not been given?

Mr. Gibson: It would expire tomorrow morning, I believe. The issu is a very narrow one.

Mr. Hickey: That is correct; it will expire tomorrow morning.

The Court (Judge Dobie): The order goes into effect tomorrow morning?

Mr. Gibson: The order is now in effect, at 12:01 this morning but no action has been taken under it.

The Court (Judge Dobie): I gathered from the petition [fol. 154] that it went into effect on June 5th.

Mr. Gibson: Fifteen days from May 20th and we believe it became in operation the first minute of today.

Mr. Hickey: Your Honors, may I say that we feel, in fairness to the Court, that the design of the statute is to prevent the United States and the Interstate Commerce Commission from being taken by surprise. We claim no such situation in this case and we are willing to waive the matter of notice if the Court is willing.

The Court (Judge Dobie): Let me ask you one more question before we talk about time. Is it possible today to go into this thing on the merits as well? In other words, we would like to avoid taking two bites at this cherry if we can clean it up today. On the other hand, I appreciate that it is a matter of considerable importance—two great railroads, the public, and a large number of stockholders—and, of course, if it is impossible to go into anything except a motion for temporary setting aside, I suppose that is all we can do.

Mr. Hickey: Your Honors, we feel that the question raised by the pleadings in this case in connection with the propriety of granting the stay will also be determinative of the merits of this case. The same argument would apply to both and we feel that there is a distinct possibility that if the Court agrees with the argument which we have to submit later, after the plaintiff has stated its case, there will [fol. 155] be precluded the necessity of this Court twice assembling.

Mr. Gibson: May I associate myself with that same position. Our first position here is in opposition to the stay that has been requested and we base that opposition on the ground that there is no substance in the plaintiff's case. Exactly the same issue is at the same time presented by our motion to dismiss which, if granted, will, of course, completely dispose of the merits and we think one hearing should suffice.

The Court (Judge Dobie): How about the other side?

Mr. Cooper: I would like to make it clear that we have no objection to going into the merits of this hearing. The only reservation that we have along those lines is that perhaps the record that is before this Court is not sufficient on certain issues. We are not certain about that. As a matter of fact, I have filed with the Court exhibits that I did not have available at the time I filed the complaint. For the purpose of the stay we are confident that the order of the Commission and the other materials we have attached as exhibits are sufficient, but as to the merits we are not certain. Therefore I would suggest that if Your Honors feel that you would like to go ahead into the merits, let us proceed to that point and if we find that the record is not clear that then we can determine what to do.

The Court (Judge Dobie): We can hear you and pos- [fol. 156] sibly decide the question of the temporary stay

without a decision on the merits until the rest is filed. Judge Barksdale has just said to me that we can hear you and then on the merits you can supplement your record.

We do not want to hurry you gentlemen but unfortunately we have other engagements. Judge Hutcheson has a criminal docket in Richmond tomorrow and we would like to dispose of it as expeditiously as possible without, at the same time, any desire on our part to stint you gentlemen. About how long do you want?

Mr. Cooper: I would want fifteen minutes.

The Court (Judge Dobie): For the whole presentation?

Mr. Cooper: Yes, sir.

The Court (Judge Dobie): Certainly, without consulting my colleagues, I can guarantee you that. That is the most modest request made by a lawyer during the nine years I have been on the Federal bench, so we won't have any debate on that.

Mr. Gibson: If Your Honors please, the comparison will not be so favorable on a time basis. We feel very earnestly about this case and, as Your Honors know, it is a large transaction, an urgent one in point of time. We think this is the time for Your Honors to confront the merits and once done it won't have to be redone. We earnestly implore Your Honors to allow two hours for the Chesapeake & Ohio, the Pere Marquette and Allegheny jointly. I believe Your [fol. 157] Honors can trust us not to waste time.

The Court (Judge Dobie): Does that include the Interstate Commerce Commission and the United States?

Mr. Hickey: On behalf of the United States, I think I can state our position within fifteen to twenty minutes. Mr. Kunkel represents the Interstate Commerce Commission.

Mr. Kunkel: If the Court please, the length of my statement is dependent on the others. I do not want to burden the Court with a too lengthy argument.

The Court (Judge *d*obie): We will go on as expeditiously as possible.

Mr. Turney: I would like to present a petition of intervention as of right for a number of stockholders of the Pere Marquette who are parties to the consolidation.

The Court (Judge Dobie): Do you represent them?

Mr. Turney: Yes, sir.

The Court (Judge Dobie): You may proceed for the plaintiffs. Of course your complaint is couched in very general terms and what we want you to do in making your ar-

gument in your own way is to tell us as swiftly and as clearly as you can why you think this stay should be granted in this case.

STATEMENT OF MR. COOPER

Mr. Cooper: This Court was assembled to determine the need for ordering a temporary stay of the effective date of an order of the Interstate Commerce Commission dated 1 April 1947 until a hearing and decision can be had with [fol. 158] respect to the merits of the principal controversies. The order of the Commission here involved went to the question of an approval of a merger agreement which was before the Commission between the C. & O. Railroad Company, the Pere Marquette Railroad Company and the Allegheny Corporation. A verified bill of complaint has been filed in the District Court of the United States for the Eastern District of Virginia alleging that such order unlawful and contrary to the statutory duties imposed upon the Commission by the Interstate Commerce Act as amended. The complaint prays for a temporary stay and suspension and a permanent injunction to set aside and annul such order.

Under the terms of the Interstate Commerce Act as amended, particularly the Transportation Act of 1920, unifications, mergers and acquisitions of control of carriers must be approved by the Commission before they become effective. The pertinent provisions of the Act are set forth in the memorandum which I have just submitted to Your Honors on pages 2 and 3. I will not attempt to go into the language which is controlling in this case except to indicate that the sections quoted cover two general propositions. In acquisitions of control, among other things the Commission is required to impose just and reasonable terms in approving the merger; secondly it is also authorized to examine and approve the issuance of securities in connection with such mergers and the assumption of liability in connection with such mergers and consolidations.

[fol. 159] The Court (Judge Barksdale): In what section does that language appear—just and reasonable?

Mr. Cooper: Section 5(2)(a).

The Court (Judge Dobie): You make no point of public interest, do you?

Mr. Cooper: No, sir. In the past the Interstate Commerce Commission has consistently taken the view that in

passing upon applications under Section 5(2) of the Act it is required to protect the interests of dissenting stockholders. This protection should either be included in the agreement of merger when it is presented to the Commiission or it should be a condition attached to the approval of the Commission.

We cite in our memorandum of law four very important cases of the Commission which go directly to that point and I would like to read a quotation from the *Southwestern Lines* case to indicate how the Commission has operated in the past:

> "We are not impressed by these reasons for the failure to prepare and announce a plan for the protection of minority stock interests. Before we can approve an acquisition of control under paragraph (2) of Section 5 we must find that the terms and conditions on which it is to be effected are 'just and reasonable in the premises.' They are not just and reasonable unless they include proper provisions for the protection of minority interests and we can not say that the provi- [fol. 160] sions to be made for such protection are proper until we know what they are, not prescribe proper provisions in the absence of adequate evidence which will enable us to determine what they ought to be."

This administrative practice has received judicial confirmation by decisions in the Federal Courts. In *Cleveland, C. C. & St. L. Ry. Co.* v. *Jackson* 22 f(2d), which is a Sixth Circuit opinion, The Circuit Court of Appeals was faced with a suit which had been brought in the District Court by a dissenting shareholder to enjoin a leasing arrangement and which was not a review of the Commission's order. The Circuit Court of Appeals held that the proper remedy for dissenting minority shareholders was to attack the order of the Commission in approval and not to maintain a separate suit in equity.

That is precisely what we have done in this case, Your Honors. The Court said, however, that there was no doubt that dissenting shareholders were entitled to protection by reviewing orders of the Commission which failed to protect their rights. The opinion reads as follows—and I think it

would be well if I read that opinion—at least the part that I have quoted from the memorandum of law:

"The plaintiff doubts that in determining the reasonableness of the terms the Commission has the right to consider the interest of minority stockholders, but ad-
[fol. 161] mits that it 'has assumed such jurisdiction, although never confirmed by any court decision.' We think it is the duty of the Commission to protect both the public and private interests, and although it finds that the acquisition will be in the public interest, it may not approve the lease unless it further finds that the consideration, terms and conditions thereof are just and reasonable—just to the lessor, the lessee, and necessarily to the stockholders of each. The ruling in the Nickel Plate case, 105 I.C.C. 425, evidences such an interpretation of its duties by the Commission.

"While it is true, as plaintiff contends, that the law does not require that minority stockholders be made parties to a proceeding before the Commission seeking the approval of a lease it is also true that the Commission has heard such stockholders when requested to do so, and that the statute itself, as we construe it, requires that the interest of the stockholders be considered and protected. Furthermore, the orders of the Commission authorizing a lease are subject to review on behalf of a stockholder in a court proceeding (citing cases). It results therefore that before the lease can be made effective, an objecting stockholder has the
[fol. 162] right to present his case before two tribunals, both of which are charged with the duty of protecting his interest."

This last case I quoted from, I would like to point out, in case there is some question about the leasing arrangement, the leasing arrangement was also approved by the Commission under the terms of Section 5(2), the same section we are operating under now of the Interstate Commerce Act. That is one way of acquiring control—merger on the one hand or lease on the other. The same principles are involved. There must be just and reasonable terms in each case.

Another Federal Court in *New York Central Securities Corp.* v. *United States* has also ruled that the Commission is required to protect the interests of the minority dissent-

ing shareholders and if it fails to do so the remedy is by way of the review of the order of the Commission approving the merger. It should be noted that congressional conformation has been given to both this established practice of the Commission in the past to protect the rights of dissenting shareholders as well as these subsequent judicial determinations by the re-enactment of the Interstate Commerce Act of 1940 by Congress without any change whatsoever.

The Court (Judge Dobie): The other side can talk for themselves—and there are enough there to do it—but I do not think that they would attack the general principle that [fol. 163] the Interstate Commerce Commission cannot say, "This merger is in the public interest; we like it; but we don't care anything about the rest of those stockholders: we will tear their stock up and throw it out of the window." I don't think they can contend that any such order as that would stand.

Mr. Cooper: I don't think they would either.

The Court (Judge Dobie): We will hear from them later.

Mr. Cooper: I would like to make one other point before I get to that. There are certain things in the present controversy which relate to the corporate relationship of the applicants which should have compelled the Commission to even more carefully scrutinize the merger agreement, to determine whether the dissenting shareholders were protected by its terms. The decision and order of the Commission reveals that the Chesapeake & Ohio Railroad now controls the Pere Marquette through the ownership of approximately 69 per cent of its common stock and 11 per cent of its preferred stock or approximately 47 per cent of all of its stock outstanding. The Chesapeake & Ohio and the Pere Marquette have a common president, interlocking directorates, common accounting, purchasing and engineering research departments, and common officers head their law and traffic departments. It is thus apparent that the applicants before the Commission stood in the nature of a fiduciary relation to the plaintiffs who represent a dissenting minority interest in the Pere Marquette Railway. In the [fol. 164] past the Commission has frequently stated that in circumstances such as these, where the majority and the minority interests are in conflict, a more careful scrutiny of any proposed plan of merger or acquisition will be undertaken in order to be certain that dissenting groups are

protected. I have cases cited to that effect and I might add that in the decision and order of the Commission in this case the Commission does give lip service to that doctrine and that is all, and I will get to that point in a minute.

The question now before this Court is whether the Commission in its order and decision of April 1, 1947, approving the merger plan, has taken any steps, regardless of degree or kind, to protect the interests of dissenting shareholders. It is submitted that there is not a line or a paragraph in the decision or order of the Commission which acts as a protection to dissenting shareholders over and above any protection that they had before the whole proceeding was instituted.

The crucial section of the Commission's decision as it affects plaintiff's rights is contained on pages 31 and 32 of Exhibit 1-A. An examination of that section of the opinion will reveal that the plaintiffs have received no protection from the Commission such as contemplated by previous decisions of the Commission or by judicial determination previously referred to. It is our position that having been denied the remedy that Congress intended that the Commis- [fol. 165] sion should afford plaintiffs, they have irreparably damaged to the extent that such rights that they have may or may not be the proper subject of future litigation. If the Commission's order of April 1, 1947, is permitted to become effective and if, as applicants have indicated, they intend to consummate the merger no later than June 5, 1947, plaintiffs will be left without the remedy which Congress intended unless this Court immediately enjoins the pending order of the Commission. The results which may follow from a determination of the merits of this controversy, after the Commission's order has been made effective and after the merger has been consummated are not too clear. The fact remains that the order of the Commission approving the merger is at sometime subject to judicial review. Upon this judicial review it may well be that this Court will determine that the order was contrary to law and that it should be vacated and set aside. The status of the merged corporation, as well as the shareholders in this event, will be subject to a cloud of illegality and uncertainty. Plaintiffs' sole desire at this time is to avoid this problem which this Court will ultimately be faced with and to avoid injury to third parties who are not directly involved in this controversy.

If Your Honors please, the crux of this case actually centers around sheets 31 and 32 of the opinion of the Commission and I would like to analyze that. The first quotation that I with to make is in the middle paragraph under [fol. 166] the caption "Jurisdiction."

> "Counsel for a fifth intervener correctly contends that the authority conferred on us by section 5 of the act is exclusive, primary, and plenary."

It is pointed out that in furtherance of the national transportation policy of the nation Congress conferred upon the Commission certain rights and privileges to oversee and supervise both the merger of these companies and the issuance of securities by these companies and their assumption of liability. Obviously the amounts that are due dissenting shareholders, whatever they may be, or in whatever forum, is a matter which should concern the Commission quite apart from the question of just and reasonable terms because it does have a bearing on the liability of the parties before the Commission.

The next part I wish to quote in that section is at the bottom of the page in which the Commission said—the last line:

> "It is difficult to conceive of a restraint or limitation on contemplated unifications better serving to frustrate the national transportation policy than provisions of State laws for compensation of dissenting stockholders on specified bases."

Of course, that would seem to imply that there were limitations on any litigation that might be undertaken by the dissenting shareholders in the state courts and that is [fol. 167] frankly, what we are concerned about. It could conceivably be that this opinion of the Commission approving the merger would stop us from litigating our rights before state courts and I will go into that matter a little more fully later. I am confining myself now precisely to what the Commission has said and precisely to what they have done to protect dissenting shareholders. After making this statement that Congress has freed the Commission from all of these restraints in state courts and by state law, that paragraph ends by saying: "This does not mean that the Chesapeake & Ohio and the Pere Marquette do not remain

free to settle controversies with dissenting stockholders through negotiation and litigation in the courts."

Then the next paragraph and this is the crucial one in this opinion:

> "The Chesapeake & Ohio, as controlling stockholder of the Pere Marquette, has an interest in the proposed merger adverse to the minority, and for that reason the terms and conditions proposed by the applicants compel close scrutiny. * * * In reaching the conclusion that the terms and conditions proposed by the applicant are just and reasonable, we have undertaken to do this"——

I would like to repeat that. The Commission is saying that in trying to find out whether the terms of the agreement are fair to dissenting shareholders, who have no part in the [fol. 168] agreement at all, it looks to the terms and conditions of the merger agreement which has no application to the rights of the dissenting shareholders whatever.

> "and, having reached that conclusion, performance of our duty in respect to stockholders is complete, in our opinion, when we make certain that all stockholders of the same class are to be treated alike."

In that paragraph they are talking about shareholders under the merger agreement, those who have come in and agreed, not shareholders who are dissenting.

The Court (Judge Dobie): That doesn't sound very pretty to me. Suppose all the stockholders are in class A and suppose the Interstate Commerce Commission says, "It is perfectly clear that those shares of the Class A stock, 5 per cent preferred, are worth $20,000 a share. We are going to treat them all alike; we are going to tear up that stock and throw it in the waste-barrel and tell them to go to hell"; do you understand that is what the Commission means by "treat them all alike"? Can they take everything they have got and tear it up and throw it in the fire and tell them to go to hell? That is treating them all alike. The Commission certainly doesn't mean that, does it?

Mr. Cooper: No. In this case what the decision did was to examine the merger agreement and find that those who had agreed to the merger agreement, and coming in under [fol. 169] the merger were satisfactorily and fairly treated

but nothing is said about dissenting shareholders anywhere. They are not part of the merger agreement and they never will be.

The Court (Judge Dobie): I don't hesitate to say that that *that* particular part reads like consummate bunk if they mean by that that they can cheat, steal or do anything they want as long as everybody in the same class is cheated in the same way. It certainly doesn't mean that.

Mr. Cooper: What this paragraph means, Judge, I don't know.

The Court (Judge Dobie): I don't think they can say, "We will take this stock and sell it for the benefit of the members of the Commission and we will each make a half million dollars apiece and that is all right just so we treat everyone alike."

Mr. Cooper: I don't think they mean that. In the next paragraph—and this is particularly important:

> "Whether dissenting stockholders, as members of a class created by the merger, are entitled to better treatment under their charter contract with the Pere Marquette is a question not within our province to decide."

There is a complete negation of the duty that has been placed by the Congress on the Commission to protect the dissenting shareholders, and I would like to point this out: [fol. 170] This argument before this Court today is not a question of better treatment; it is a question of any treatment. There is nothing said in this whole opinion as to how dissenting shareholders shall be treated. It is not a question of better treatment at all; it is a question of how they are to be treated in some way or other and there is nothing anywhere that covers that point.

> "Objecting stockholders have the right to present their case before two tribunals, both charged with the duty of protecting their interests."

Of course, they do, and one of the tribunals is the Interstate Commerce Commission and one of its duties is to protect their interest, which they have not done and that is why we are before the second tribunal which is this Court.

The Court: (Judge Dobie): Do you understand that to mean that the Commission is saying that they have an Interstate Commerce Commission and also have a special three-

judge court and therefore they can, if they wish, jump over certain things and leave them to the Court for the first time?

Mr. Cooper: It looks something like that in this case, although I don't know. I don't know what they had in mind.

At the conclusion of my argument I would like to make this point and I might as well make it now. In the case of each of the defendants in this proceeding I would like the Court to request that counsel point to the place in the Com- [fol. 171] mission's order or opinion where the dissenting shareholders are protected anywhere other than protection which they had before this proceeding started.

The Court (Judge Dobie): That is a fair challenge and I dare say they are going to take it up.

> Mr. Cooper; There is one more sentence: "Possibly the courts may be called upon to determine controversies between dissenting stockholders and their companies. Because of the expense that might be involved, it is necessary that we consider that possibility."

And then they go into a long discussion as to the various bases upon which dissenting shareholders could be protected.

That is the conclusion of my argument, Your Honors. There is one other point that perhaps I should go into but I don't believe that it is necessary and that is on the question of our irreparable damage and the adequacy of our remedy at law. We do not feel that this Court should take into consideration any state remedy that perhaps we should have. Our feeling is that Congress conferred a remedy here which was lodged with the Commission and the Commission has paid no attention to it and has gone ahead, approved the merger, and the order has already gone into effect without any protection to us whatsoever. However, if the Court feels that we should go into this question of [fol. 172] possible state remedies, I will be glad to go into that.

The Court (Judge Dobie): Suppose we hear from the other side and we will hear from you later. You have certainly laid down a challenge to them and I know they are going to do their best to meet it.

STATEMENT OF MR. HICKEY

Mr. Hickey: May it please the Court, first I would like to accept the challenge. If the Court will kindly turn to Sheet 31 of the Commission's opinion and report in this case, the second paragraph thereof reads as follows:

> "Accordingly, considering the Pere Marquette's investment according to its books, other property values, the company's history as to earnings, its future prospects, and the market appraisal of its stocks, all as set forth above, we find that, as to the stockholders of both parties generally, the proposed ratios of exchange, stock issues, and assumptions of indebtedness are just and reasonable."

There, Your Honors, is a specific finding by the Commission that the disposition which has been proposed in this merger is just and reasonable and we submit that that is all the statute requires. I might further point out, however——

The Court (Judge Dobie): Are you going to say anything about what those terms were?

Mr. Hickey: Yes, Your Honor. Those terms are set [fol. 173] forth in detail with respect to the dissenting stockholders on Sheet 29. Right at the bottom of Sheet 29 the Commission concludes with its statement, after a detailed analysis of these various things which are summarized in the paragraph I just read to Your Honors:

> "On the whole, it would seem that the prospects of Pere Marquette stockholders for returns on their investments would be enhanced by merger of their company into the Chesapeake & Ohio."

That is the conclusion of the Commission. This is a long report and there is considerable detail which I won't take the time of the Court to read, but there is on Sheet 18 the specific disposition which the Commission finds in that paragraph which I originally read to Your Honors to be just and reasonable. On Sheet 18 the Commission sets forth the ratios of exchange and there is set forth the exchange of stock.

The Court (Judge Dobie): In other words, I understand that for each share of five per cent cumulative prior preference stock of Pere Marquette they will receive in return one

share of preferred and one-third share of common stock of the C. & O.?

Mr. Hickey: That is correct, Your Honor.

The Court (Judge Dobie): It looks as if they have done something for them.

Mr. Hickey: Of course, they did, Your Honor. They took the proposals made, examined them and discussed them [fol. 174] in detail in their report and reached the conclusion that those proposals were just and reasonable. What is the Commission doing? It is performing its statutory obligation. Somebody says, "Well, your determination that that is just and reasonable isn't right." The way to attack that, as you well know, is to challenge it on the basis of evidence of record to support the finding of the Commission, and, if you will examine this complaint, there is not one word of challenge in it.

The Court (Judge Dobie): For example, if there was a showing that the Pere Marquette was selling in the open market at 150 and that the Chesapeake & Ohio was selling for around 50, of course one and a third for one would not be a very adequate return.

Mr. Hickey: It depends on the evidence to support the Commission's order. In all of these cases, as the Court well knows, if the Commission made a flat finding that that is a just and reasonable disposition of all stockholders, everybody, and you want to challenge that and say it is wrong and arbitrary, how do you do it? You come in and produce the evidence of record and you say, "There isn't any evidence to support that finding," and that is the only way you can upset it. There is not a word of challenge in here to the sufficiency of evidence to support the Commission's findings. In other words, the plaintiffs have proceeded on the bald assumption that there is nowhere in the [fol. 175] report, to quote his words, a single finding—in fact, he challenged me to find it and I think we have found where the Commission finds that the disposition made is just and reasonable to all the stockholders. The fundamental fallacy that the plaintiffs commit in this case throughout is that they somehow want to isolate this little group of dissenting stockholders. He wants to set them apart and he wants to set them apart not only from the majority stockholders but he even wants to set them apart from the minority stockholders and he says you must treat them as a separate and distinct class; you must make

specific findings as to them and, what is more, you must take distinct action as to them.

If you will examine all of the cases cited in the memorandum which the plaintiff has filed with Your Honors you won't find a single one of them where the Commission has ever said that it is obligated under the statute to make specific disposition as to dissenting stockholders. Not at all. All of those decisions say that the Commission must take into consideration and make findings——

The Court (Judge Dobie): Let me ask you this: Was this plan submitted to the holders of these securities? Was there any voting on it?

Mr. Hickey: Yes, Your Honor.

The Court (Judge Dobie): What was the vote? Do you know approximately?

[fol. 176] Mr. Kunkel: It is on Sheet 9 of the report.

Mr. Hickey: Sheet 9 sets forth the results.

The Court (Judge Dobie): Could you tell us broadly what they were? For example, what were they in this particular class, this stock held by the dissenting stockholders?

Mr. Hickey: It constitutes approximately two per cent of the total stock. The dissenting stockholders constitute approximately two per cent of the total amount of stock held and about ten per cent of the minority stockholders.

As I said, the Commission has recognized its duty in cases under Section 5(2) to look after the interests of minority stockholders but there is a very important point to be made in connection with that: If you will examine those cases you will find that every single one of them is a stock acquisition case or a lease case. Why is that important as distinguished from this case? Simply because in this case you don't have a stock acquisition case where one corporation is going to control the other and that corporation is going to continue to exist. You have its abolition by this merger, the consolidation of that corporation and you have now the origin of one single corporation. Why is that important? It is important for this reason: When you have an acquisition of stock and you have these majority stockholders taking over another corporation, they are obviously, in the old traditional equity sense, in a fiduciary relationship to the minority stockholders. Why? Be-

[fol. 177] cause they could take action through their majority control to freeze them out by deteriorating the service

or by taking action which would divert traffic from their routes and, in other words, put them behind the 8-ball. You don't have that situation here and that is why this case differs essentially. But even conceding that the Commission's finding with respect to the acquisition cases is equally pertinent in a consolidation proceeding, the Commission has made a finding here. They found it just and reasonable.

There is a further point to be made and that is that there is no statutory obligation of the Commission to specifically protect the rights——

The Court (Judge Dobie): I notice in that tabulation—I don't know whether it means anything but I will throw it out to you—those voting for the merger and against it, and the highest percentage against it, which is less than a third, is the Pere Marquette preferred which I understand is the stock that the plaintiffs hold here—73,230 for and 30,000 against, whereas on the other side you—4,500,000 to 50,000, about ten times, and 374,000 for and 27,000 against, which is more than ten times. In other words, there is a very much higher percentage of dissenting stockholders when you get to the preferred stock of the Pere Marquette.

Mr. Hickey: That is right.

The Court (Judge Dobie): I don't know that that means [fol. 178] any thing.

Mr. Hickey: In connection with that question I would like to have it discussed by the people who are quite familiar with the actual transactions that took place here. I got the case on short notice and I have prepared my argument along definite legal lines and I think in justice to Your Honors the question could be more adequately answered.

The Court (Judge Dobie): I do not mean to interrupt you when these points come up but I think that has something to do with the situation. If you have a very large group of these people, almost a majority, I think their case could be stronger than if you had an infinitesimal minority.

Mr. Hickey: I would like briefly to refer to the statute itself on which the Commission is proceeding and under which the plaintiffs have charged the obligation to exist. Before I do that I would like to read one brief statement from the plaintiffs' complaint. On page 3 of the complaint, paragraph 6, the plaintiffs come down to what they have described as the crux of this case and I will concede that

it is. It is the crucial thing in this case. Plaintiffs state failure to include protection for the plaintiffs as dissenting shareholders as a distinct class created by the merger is contrary to law and in direct violation of the Commission's statutory duty to impose just and reasonable conditions for the protection of all interests concerned. That is the only [fol. 179] charge made in this case. As I said, there is no challenge to the accuracy of the findings; there is no challenge to the sufficiency of evidence to support what findings are made. That is the bald assertion, that the Commission has not discharged an obligation made obligatory upon it by statute. Let us look at the statute.

The Court (Judge Dobie): I don't quite understand what he means by failure to include protection. That is a pretty broad phrase and it is a pretty indefinite phrase and I would like him to tell me when he comes back exactly what he means by that when I understand from you that there are express provisions as to how many shares these people get and how they get them, and so on.

Mr. Hickey: My first answer is that there is no obligation on the Commission at all to treat dissenting stockholders nor have I ever seen any decision anywhere which even mentions the word "dissenting stockholders." It always speaks in terms of minority stockholders and these dissenters are but a small part of the minority stockholders involved in this case, as a subsequent argument by Mr. Turney will make clear to Your Honors. In the second place, even assuming in the argument that there is an obligation on the Commission, the Commission has in its report taken care of the interests of the dissenting stockholders. In other words, it has gone farther than the statute requires. All that the section requires—the specific words of the statute are:

> [fol. 180] "If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable."

There is the entire statutory obligation. The Commission has specifically followed the requirements of the

statute. It has found this matter to be in the public interest and it has further found that the terms and conditions proposed are just and reasonable. That is the Commission's obligation and we submit it has discharged that obligation.

I would like to make brief reference, Your Honors, to a Supreme Court decision—*New York Central Securities Corp.* v. *United States*, 287 U. S. 12, a case decided in 1932. I don't like to burden this hearing with citation of cases but the reason I specifically call this to your Honor's attention is this: In the plaintiffs' memorandum he cites the lower court's decision. There is no citation to the Supreme Court's decision which affirmed that lower court decision and there is a very significant difference between the two opinions, and it says that when the issue of protection to minority stockholders—not dissenting stockholders—arose [fol. 181] in the lower court, the lower court treated it like the case the plaintiffs cited to Your Honors that he read from as an obligation of the Commission but it found that the Commission had satisfactorily performed that obligation.

The Court (Judge Dobie): You admit, do you not, that the Commission owes some kind of duty to all security holders?

Mr. Hickey: That is correct but I would like to make this distinction which I think this case points out: When this case got to the Supreme Court, the Court acknowledged that there was an obligation here but it pointed out that any right that existed didn't give the plaintiff standing to maintain an independent suit because it happened to be a small part of the stockholding group that didn't like the action that was taken, and it did so significantly in the following words, quoting from page 28 of the decision:

> "Questions as to the alleged breach by the New York Central, as majority stockholder of the Michigan Central, of its fiduciary duty to the appellant as minority stockholder, in the light of the terms of the indenture under which the voted shares had been pledged to secure bonds, are not properly raised in this suit under the Urgent Deficiencies Act and hence are not open to review on this appeal."

It simply means that the Court has recognized that the Commission, in order to deliver a fair and just opinion,

[fol. 182] must of course take into consideration, in reaching the conclusion that the terms and conditions proposed are just and reasonable, the way in which those terms affect stockholders as a class.

The Court (Judge Dobie): The effect it would have on different ones in different situations?

Mr. Hickey: Correct, but that doesn't mean that a small group, a dissenting group within the minority stockholders, can come into Court and maintain an independent suit. Why? If you read through the records and briefs that were filed in connection with that *New York Central Securities* case as I have—and I don't want to take the time of the Court to go through them—it is quite clear that the remedy that exists is available to the plaintiffs in other tribunals. If it is a contract right he should sue on that contract right. He has his remedy and the Supreme Court was taking pains to point that out.

The Court (Judge Dobie): The Interstate Commerce Commission in these cases does go into countervailing and comparative equities of the parties?

Mr. Hickey: That is correct.

The Court (Judge Dobie): I remember in the Seaboard case I heard about six of those appeals. There was the question of bonds in the Deepwater and High Point Railway Company, I think about forty miles down in some southern [fol. 183] state and just before the reorganization some man bought a million dollars worth of those bonds. I forget whether he paid 35 cents or two dollars and a quarter for them. I certainly know we took into consideration that that man got those bonds for practically nothing and tried to block a big reorganization for his own profit, whereas if that had been bought at face value they would certainly have much more standing in Court. I understand, of course, that the Commission can't go into minute detail but it considered the comparative equities of all parties?

Mr. Hickey: The only point I am trying to make is that the Commission cannot single out little blocks of stock here and there and say, "This fellow doesn't like what happened and here are a couple more that don't like the arrangements and we will take that into consideration." The Commission has to approach the problem and the primary criterion is from the public interest and the interest of adequate transportation, adequate economical transportation in terms of the national transportation problem. There isn't a re-

organization proceeding or liquidation proceeding where you get into fine details of each specific block of stock, but the Commission, as Your Honor suggests, recognizes that a fair and equitable disposition must be made in order to find that the terms of the merger are just and reasonable and it has done that here.

In conclusion, Your Honors, I would like to say that this is a rather technical point but it certainly should be made. [fol. 184] Under Section 47 of 28 U. S. C., under which we are proceeding today, on a motion by the plaintiff for a temporary stay, there is the specific requirement——

The Court (Judge Dobie): Irreparable damage?

Mr. Hickey: There has been no showing of irreparable damage. The only way I know of that you can show irreparable damage is to introduce your witnesses or offer affidavits. There has been no attempt to show irreparable damage here. That is jurisdictional. It says in the statute that the Court shall not enter the injunction unless it is shown and it differentiates.——

The Court (Judge Dobie): If we make a specific finding of irreparable damage, then it must be by incorporation by reference before the Court and bring it in.

Mr. Hickey: How can you do it?

The Court (Judge Dobie): That is a problem.

Mr. Hickey: Unless you have some questions, that is all I have.

The Court (Judge Dobie): We are very familiar with the terms of that statute.

Mr. Hitt: I have a motion to intervene on behalf of Sterling Grace & Company of New York, Connecticut Mutual Life Insurance Company and Keystone Custodian Funds, stockholders in the Pere Marquette Railroad.

The Court (Judge Dobie): For what purpose are you [fol. 185] intervening?

Mr. Hitt: Intervening in support of the Commission's decision.

STATEMENT OF MR. KUNKEL

Mr. Kunkel: May it please the Court, I appear on behalf of the Interstate Commerce Commission. I will take a moment to focus the attention of the Court upon the motion for temporary stay. As this Court knows, the orders of the Commission are not automatically stayed with the filing of a suit under the Urgent Deficiencies Act. The temporary

stay which the Act provides for is an extraordinary remedy. The Court in exercising its discretion in the matter of the issuance of the temporary stay I think should be satisfied on four particular points; first, that the plaintiff has standing to maintain the suit on the face of the complaint, which is the only pleading which the Court has to look to; second, that from the face of the complaint the issue is one cognizable by the Court; and, thirdly, that the equities lie with the plaintiff; and, fourth, the statutory requirement that the failure to issue a temporary stay will work irreparable damage to the plaintiff.

The plaintiffs here are a small minority of preferred stockholders. They have so designated themselves before the Commission and in the complaint in this case. The complaint charges the Commission (and I think this is the only issue in the case) with failure to perform its full statutory duty in failing to include protection for plaintiffs [fol. 186] as dissenting stockholders as a distinct class. The complaint fails to allege what the plaintiffs deem just and reasonable conditions for the protection of the rights that they claim. Paragraph 7 of the complaint alleges the Commission's failure to recognize and protect the plaintiff's rights under the Interstate Commerce Act, but the only rights of the plaintiffs under that act are to be accorded just and fair treatment.

The Commission in this case found that the proposed ratio of exchange of securities was just and reasonable to all parties in interest which included these particular plaintiffs.

The Court (Judge Dobie): And the Commission, I suppose, had quite a good deal of evidence before it, did it not?

Mr. Kunkel: The Commission had not only quite a great deal of evidence but if the Court will refer to the report itself where it undertook to evaluate the securities of the acquiring company and of the company to be acquired.

The Court: (Judge Dobie): Where is this?

Mr. Kunkel: On Sheet 24, where they discuss the market price, the earnings of both companies, the histories of the companies with respect to those earnings and they took into consideration property values and took into consideration valuations which the Commission had determined which we know as rate-making valuations, and having considered the proposed ratio of exchange in the light of all those various

[fol. 187] tests of value, it came to the conclusion that the ratio represented a fair rate of exchange for the stock.

The Commission in making that determination was not concerned with whether one group of stockholders was unanimous in assenting to the merger plan. I submit it would still have been the duty of the Commission, if there had not been one dissenting stockholder of a given class, to determine whether those stockholders were being treated fairly and justly, and the mere fact that a very small group of those have indicated their intention not to go ahead with the plan or take advantage of the merger agreement doesn't impose an additional duty under the statute upon the Commission, and the Commission in its report recognized that. It found that it did not have any jurisdiction to adjudicate the private rights of individual stockholders who might be unwilling to go along with the merger, whether those rights arose by virtue of state merger laws, whether they arose out of the common law in merger proceedings to have the dissenting stock evaluated and to be paid for in accordance therewith, or whether they arose out of the actual contractual rights which arose under the terms on which the stock itself was issued. But the Commission did not foreclose the rights of any of these dissenters, whether there be one or a thousand, to pursue whatever their legal remedies were, and I think that is perfectly clear.

If the Court will refer to Sheet 32, the last paragraph, [fol. 188] it says:

> "Possibly the courts may be called upon to determine controversies between dissenting stockholders and their companies. Because of the expense that might be involved, it is necessary that we consider that possibility."

What did the Commission do? It started with an estimate that there would be two per cent of the stockholders who might refuse to go along with the merger. Then the Commission was concerned with how much would the companies have to pay out to release them from the obligations of those stockholders, and it made computations on three bases—the book value of the stock, the value based on earnings, and the market price—and then it came to the conclusion that with respect to any of those bases upon which the Chesapeake & Ohio might be called upon to satisfy the claims of the dissenting stockholders "it appears that the

consummation of the merger will not involve a burden of excessive expenditure.

The Court (Judge Dobie): That means on the part of the stockholders?

Mr. Kunkel: That means in paying off the dissenters. So therefore we say that the Commission's order in this case did not compel these plaintiffs to accept the terms of the merger. Stockholders who are unwilling to acquiesce in the merger were left with the alternatives of selling their [fol. 189] securities at the market or invoking such rights as they might have under state law, common law or their contract. The Commission in its report, as I pointed out, specifically recognized that right and in any case the Commission is not the forum in which such private rights are to be adjudicated and there is no compulsion in the Interstate Commerce Act upon the Commission in that respect. Plaintiffs have an adequate remedy at law, recognized by the Commission in its report, and therefore, having an adequate remedy at law, they have no standing to invoke the equity powers. What this suit is, in essence, is an attempt to compel the Commission to adjudicate the private rights of these particular dissenting stockholders and those are private contractual rights arising out of their stock holdings. Their objective, while it is well disguised, is to obtain the par value of that stock plus the unpaid dividends that have accumulated to date, and that is the sole object of this.

The determination of that question involves adjudication of legal principles, principles that the Commission is not competent to pass upon and which might involve the laws of state jurisdictions, various state jurisdictions, and therefore we say under the authority of the Supreme Court in the *New York Central Securities* case that the issue here is not one that is cognizable.

The Court (Judge Dobie): Let me see if I understand it: Suppose you have four corporations and they are being [fol. 190] merged, one in Michigan, one in Indiana, one in Illinois and one in Ohio; as I understand from you, it is not up to the Interstate Commerce Commission in approving one of these mergers to pass on what the rights of all of those parties would be under the laws of the states?

Mr. Kunkel: No. It might be, as in the case of Virginia, that provision is made for dissenting stockholders in a merger to apply to the court and have three appraisers appointed to appraise that stock. In another state it might

be five appraisers or they may have different bases upon which that stock is to be appraised. It would put an insuperable burden on the Commission to go into those various state laws and make a determination in this case as to what each particular dissenter might expect to get out of his stock, and we say, of course, there is no evidence of irreparable damage here.

As to the balance of the equities as between the vast majority of assenting stockholders in this case and this very small group of dissenters, I leave that to the interveners who represent those classes directly.

STATEMENT OF MR. GIBSON

Mr. Gibson: May it please the Court——

The Court (Judge Dobie): You are appearing for the C. & O.?

Mr. Gibson: Jointly for the C. & O., Pere Marquette and Allegheny Corporation, the three companies before the Commission.

[fol. 191] Your Honors have heard able statements of certain aspects of the case for those roads and the Allegheny Corporation, and we shall attempt to give the Court an orderly consecutive statement in summary form of the whole of this transaction. Our point of view, as I said in opening, is that we do not believe that there is any substance in the plaintiffs' petition and, for that reason, we ask that the stay be denied and that the petition be summarily dismissed.

Let me ascertain and identify the issue. What is the issue? What is Mr. Cooper here complaining about? That is not altogether an easy question to answer because of the notable generality with which his case has been presented to this Court. I think it clear, however, as Mr. Kunkel has so ably said, that what he is looking for is cash. He does not assert that this merger of the C. & O. and Pere Marquette is not affirmatively in the public interest as the Interstate Commerce Commission has found. All he is seeking to get is better treatment for the preferred stock of Pere Marquette Railway Company held by his clients. So it comes down to a question of money.

The Court (Judge Dobie): You admit that has some slight importance.

Mr. Gibson: Of course, Your Honor.

The Court (Judge Dobie): You rem- -ber the story of the

Irishman who was run over by a truck and he was knocked [fol. 192] unconscious and as he was coming to in the hospital he heard the nurse say, "He will recover." He said, "How much?"

Mr. Gibson: Your Honor will understand I was not seeking to disparage the issue by characterizing it a question of money.

The Court (Judge Dobie): I have known several judges to consider things of that kind.

Mr. Gibson: Specifically then, what does this question of money mean as applied to these issues here. The assertion means that the Interstate Commerce Commission was under an absolute legal duty to require as a condition to authorizing this merger that a sum in cash be set apart for the payment of the preferred stock of the Pere Marquette Railway Company, even though the Commission, under the mandate of Congress, has discretionary administrative authority to review and weigh and appraise the relative worth of these various claims and determine the particular treatment that is just and reasonable for each, and it is solely because the Commission refused to impose an express condition requiring the setting aside of cash for these dissenters——

The Court (Judge Dobie): They got a certain number of shares in the C. & O., didn't they?

Mr. Gibson: Of course under the merger agreement they will. I would like to come to that when I reach the merger agreement.

[fol. 193] Your Honors have been given a very fragmentary and inaccurate picture of the merger agreement. It does not only provide treatment for assenters; it provides treatment for every share of stock but, as Judge Barksdale has pointed out, dissenters who have given notice of objection within a certain period have an additional privilege and in lieu of taking that stock they may ask for cash under the Virginia law, if they prefer to do it. So the decisive question is whether the plaintiffs have any legal basis for a claim that there was an unequivocal duty on the part of the Commission to establish separate cash protection for their benefit as dissenting stockholders. The only ways such a contention could be made are one on the state law and the other Federal. It is not the duty of this Court or of the Interstate Commerce Commission, as Mr. Kunkel has so clearly pointed out, to sit for the purpose of enforcing appraisal remedies that may exist under state legisla-

tion. True enough, a number of the states, and Virginia is one of them, provide that in the event of merger dissenting stockholders are entitled to get cash, but by applying to a state court and conforming to state-directed procedure.

The Court (Judge Dobie): As I understand, the Interstate Commerce Commission does not in any way touch or impair those rights?

Mr. Gibson: Precisely, Your Honor. That is, as we conceive it, the only argument the plaintiff could make here, [fol. 194] namely, that there is something in the report or something in the order of the Commission that has the effect of superseding that right of appraisal that would otherwise be open to them under the state law, but of course I will point out the words and make that plain when I get to the Commission's action. As a matter of fact, the Commission was perfectly unmistakable on that point. The Commission said:

> ". . . the Chesapeake & Ohio and the Pere Marquette . . . remain free to settle controversies with dissenting stockholders through negotiation and litigation in the courts."

And in conformation of the meaning of the Commission's original language, as admitted by Mr. Kunkel in the record here this afternoon, we also for the affected carriers admit that the Commission's action leaves the plaintiffs entirely free to prosecute any appraisal rights they may have under legislation of the states.

If, on the other hand, the plaintiffs argue that as a matter of state law they are entitled to require the Commission to improve on their rights under state law, we submit that is a contradi-tion in terms and deserves no further consideration.

There is some intimation in their briefs and petitions before the Commission that what they seek is a trust fund set up in cash for their security. All of these appraisal stat- [fol. 195] utes in the several states do nothing more than provide an optional position of a creditor for dissenting stockholders who take certain steps by giving notice within prescribed periods, but the status of a creditor is universally considered sufficient for the protective policies of that local legislation and, so far as I know, no such statute has

ever gone to the length of setting up a trust fund for the benefit of dissenters. The magnificent credit standing of the Chesapeake & Ohio Railway as one of the healthiest and richest railroads in the country would make any suggestion of that kind perfectly absurd on the facts of this case. So clearly, we submit, no possible issue under the appraisal rights of state legislation could possibly arise here.

It follows from this gradual elimination of possibilities that there is only one assertion that could sensibly be made before this Court and that is that the Schwabachers were entitled as a matter of Federal Law to require the Commission automatically and as a matter of duty to establish a cash fund for their benefit, despite the fact that the statute empowers the Commission to exercise an administrative discretion on the fairness of the plan proposed before it. Unless such assertion is sound, it is impossible, we submit, for the plaintiffs to have any standing in this Court and we submit that any such assertion is flagrantly unsound because it would undermine the whole policy of the applicable Federal legislation.

[fol. 196] One other comment on the issue and that is an important one. Surely the Schwabachers cannot assert to this Court that as a matter of state legislative position or constitutional right they are entitled to retain their stock in Pere Marquette and thus prevent the accomplishment of the merger. It is settled law that the Federal agencies, in the accomplishment of Federal policy are entitled to override the existing provisions of securities existing under state law, whether by dissolution of state corporations as the Supreme Court held in *American Power & Light Co.* v. *S. E. C.*, or by rearrangement of security holders' interests in state corporations, as Your Honors have known, from 1904 (*Northern Securities* case and the *Reading* case). So I come back to the point that the only issue that can be presented is whether Federal law imposes such a mandatory duty on the Commission, despite its attempt to confer discretionary authority——

The Court (Judge Dobie): Suppose one of these stockholders said, "I am a shareholder and my father was and my grandfather and he got some from old man Pere himself and I am going to hold on to my stock come hell or high water," could he do it?

Mr. Gibson: You can make him turn it in under two grants of power; first, the statute of the state of Michigan,

under which Pere Marquette is incorporated, provides in terms that a merger may be made upon the assenting vote of [fol. 197] a majority of each class.

The Court (Judge Dobie): Suppose he said: "I don't want any rights under it but I am going to stay a Pere Marquette stockholder?

Mr. Gibson: He is entitled to retain his certificate as a sentimental souvenir but his legal rights are those of a C. & O. stockholder. He can keep the paper but his legal rights are governed.

The Court (Judge Dobie): I know a lady who kept her coupons. She said they looked so pretty on a corporate bond. She had a perfect right to do that, of course, and not collect them.

Mr. Gibson: If that is then an accurate identification of the only issue that is presented here, I should like to go first to a general and very brief summary of how this case came up, what the facts are, and then to explore briefly the statutory provisions that define the powers of the Commission and the resulting permitted scope of review.

Perhaps you would like to have a map which shows the properties we are talking about. As Your Honors know and as the map makes graphic, the C. & O. is a major road between Chesapeake Bay on the east and Toledo and Chicago on the west. Its principal business is carrying coal. Indeed, it is the largest bituminous coal originating carrier in the country. On the other hand, the Pere Marquette is [fol. 198] centralized in the lower peninsula of Michigan. It connects with the C. & O. at Toledo, at Chicago, and at La Crosse, Indiana, and its territory is principally an industrial region, coal consuming manufacturers. Naturally the lines are complementary so that the Pere Marquette is the natural northwest extension of the C. & O. facilities. As a matter of fact, the C. & O. acquired control of the Pere Marquette back in 1929 with the approval of the Commission. So there has been a period of actual demonstration through the years of the value——

The Court (Judge Dobie): They have had unitary management?

Mr. Gibson: Additional advantages are expected to flow from the merger—reduction of interest charges on Pere Marquette funded debt and it rather strengthens its credit position and supplying a strong, uniform and efficient carrier throughout the whole region of the two systems and

finally producing operating economies estimated at about three hundred thousand dollars a year.

In the background negotiations were begun in the latter part of 1945 for a merger of the two companies and they culminated in a merger agreement. It was approved by the boards of directors of both companies on February 19, 1946. That is the proposal that is before Your Honors today. It was then submitted to the stockholders of both companies. A question was asked about that earlier. It was approved [fol. 199] by the holders of 59 per cent of all outstanding shares of common stock in the C. & O., the only class of stock outstanding of the C. & O. It was approved by an equal or greater vote of the outstanding shares of each of the three classes of Pere Marquette stock, namely, 82 per cent of the outstanding shares of common stock, 59 per cent of the preferred stock represented by Mr. Cooper and 71 per cent of the prior preference stock.

Maybe Your Honors would feel that a more realistic tabulation of the vote is in terms of the percentage voting for to the total voting rather than the total outstanding because so many people insist on sleeping, no matter what you send them through the mail. On those percentages C. & O. was 99 per cent, Pere Marquette common 93 per cent, Pere Marquette preferred 71 per cent and Pere Marquette prior preference 93 per cent. To the vote of the preferred stock we are unable to attach any distinctive significance.

The Court (Judge Dobie): Maybe people up in Michigan don't know how good the C. & O. is.

Mr. Gibson: They may have voted on the Civil War reasons but anyway the issue before the Commission was what was fair and equitable and not popular vote.

When this vote was had the merger agreement was submitted in lengthy proceedings before the Interstate Commerce Commission. I want to comment on that just for a moment. The application was filed on March 8, 1946; a full [fol. 200] hearing ensued; briefs were filed; a proposed report was issued by an examiner; exceptions and briefs in support of exceptions were then permitted and at that time Mr. Cooper came in for the Schwabachers to object to the plan. Then the case was argued orally and finally on April 1st of this year Division 4 of the Commission handed down its report and order authorizing the merger and that is the report and order that Your Honors have before you now.

The Court (Judge Dobie): It never went to the full Commission?

Mr. Gibson: I think not.

Mr. Kunkel: It went to the full Commission on petition for reconsideration which was denied by the full Commission.

The Court (Judge Dobie): Unanimously?

Mr. Kunkel: Yes, sir.

Mr. Gibson: Your Honor will understand by statute Division 4 has the full power——

The Court (Judge Dobie): I understand. It adds a little more force when it is the Commission and not just one division.

Mr. Gibson: More people saying the same thing when one is sufficient.

The merger agreement is not designed, as Your Honors might have supposed from the comment—not intentionally—of Mr. Cooper, to relate only to the rights of people [fol. 201] who want to vote for it. The words as quoted by the Interstate Commerce Commission are universal in their application. A merger agreement necessarily must be under Virginia law. Otherwise it can't be approved. It provided specified treatment, differing in nature, for the holders of each of the three classes of stock of Pere Marquette Railway Company. So far as the preferred stock is concerned, held by the Schwabachers, the treatment is eight-tenths of a share of new 3½% per cent convertible preferred stock of C. & O., convertible into 1 6/10 shares of common and, in addition——

The Court (Judge Dobie): Three-eighths of one of those shares?

Mr. Gibson: Eight-tenths, Your Honor and, in addition, four-tenths of a share of common stock of C & O. That package is to be given to each one share of Pere Marquette preferred stock, whether voting for the merger or not, or dissenting or not. Everybody is entitled to get that. That is the treatment proposed in the merger agreement and that is the treatment with which the Commission was concerned.

The Schwabachers did not oppose the merger itself. They intervened before the Commission for the purpose, as here today, of seeking better treatment, more favorable treatment for the Pere Marquette preferred stock.

The Court (Judge Dobie): Did they appear before the Commission and say, "Three-eighths isn't enough but five-
[fol. 202] eighths would be"?

Mr. Gibson: They have not articulated their demands in the form of any specified percentage of new securities.

The Court (Judge Dobie): Merely indicated that what has been given to them by the Commission is not enough?

Mr. Gibson: Exactly, and the obvious intent of their intervention there, as Mr. Cooper said, was to procure cash in an amount equal to par plus accumulated unpaid dividends on their stock.

The Pere Marquette preferred stock that is given very substantial recognition in the merger agreement hasn't paid any dividends since 1931.

The Court (Judge Dobie): They received nothing before and they wouldn't be satisfied with twice as much?

Mr. Gibson: No arithmetical factor would satisfy them.

The Court (Judge Dobie): One man complained bitterly of his allowance. They had nine of these bondholders committees so he went out and formed another just to make it a little harder and his contribution was that he did everything he could to keep anybody from doing anything. So Judge McClintic allowed him nothing. I asked him if he thought he would be satisfied if we multiplied that compensation by fifty and he thought a minute and said, "No."

Mr. Gibson: I hope Your Honor will not ask me mathe-
[fol. 203] matically——

The Court (Judge Dobie): I wouldn't be afraid to ask you what is twice nothing. Even a Harvard man knows that.

Mr. Gibson: Those were the exceptions that the Schwabachers made before the Commission and Your Honors may be sure those contentions were not ignored before the Commission. On the contrary they were considered in the most painstaking and thorough way and the Commission in its report recognized that under Section 5 of the Interstate Commerce Act, giving it authority over mergers and other unifications, and under Section 20(a) of the same act, giving it authority over the issuance of securities, it had a statutory mandate to impose terms that would be just and reasonable and as a result of that the Commission considered the fairness of the merger terms from the point of view of each of the three classes of Pere

Marquette stockholders, weighing for this purpose past earnings, prospective and future earnings and market ratios of the old stock on "when issued" basis for the new, and book value and so-called rate-making values, if they have any true significance.

The Court (Judge Dobie): Was there any trading in this stock "when issued"?

Mr. Gibson: Yes, Your Honor.

The Court (Judge Dobie): On the Board?

Mr. Gibson: I don't know that it is listed on the Stock [fol. 204] Exchange. It may be over the counter. The quotation at the close yesterday I think was 98. I can get the figure more precisely.

The Commission's ultimate finding is summarized in these words:

> ". . . considering the Pere Marquette's investment according to its books, other property values, the company's history as to earnings, its future prospects, and the market appraisal of its stocks, all as set forth above, we find that, as to the stockholders of both parties generally"——
>
> And the Commission's ultimate finding was "—the proposed ratios of exchange, stock issues, and assumptions of indebtedness are just and reasonable."

Your Honors will note that is not confined to the assenting stockholders; it is extended to all stockholders of both parties generally, and they looked at that not only from the point of view of the overall picture but separately and specially. That was the Commission's overall conclusion that this allocation of eight-tenths of a share of preferred and four-tenths of a share of common was just and reasonable and in the light of that basic finding——

The Court (Judge Dobie): As I understand, they found they were not only getting as much but they were getting more.

[fol. 205] Mr. Gibson: Your Honor has touched at the bottom of that page on a very important thing. The nominal dividend rate on the Pere Marquette is five per cent which wasn't paid and hasn't been paid since 1931. Your Honors must not misunderstand me. During the war period the Pere Marquette traffic had been swollen, of course, like other railroads to high levels and substantial earnings have been

made on its preferred stock but the Pere Marquette has had problems. There were deficits earlier and it had family troubles to settle in its debt structure which has now been substantially improved. Those are the reasons why the C. & O. was willing as a financial matter to undertake a merger with the Pere Marquette.

But coming back to this, they have a dividend rate of five per cent and it wasn't paid and under the allocation of new securities provided in the merger agreement those same stockholders will get a return on existing dividend rates, which the Commission found could be reasonably continued, of 4.2 per cent, if they elect to retain their 3½ per cent preferred position, or of 5.88 per cent if they convert into common.

The Court (Judge Dobie): Where is that?

Mr. Gibson: That is the table at the bottom of page 29. So that was the conclusion of the Commission on the real merits and then they took up this separate special contention of the Schwabachers that because they dissented they [fol. 206] were automatically entitled to a cash award, irrespective of the quality of the security allocation. On that point the Commission noted two things—and I am trying to summarize Sheets 31 and 32 of their report. On Sheets 31 and 32 the Commission noted in the first instance the dominance of the public interest in these matters of railroad unification. In the second place it noted the effect of its own order, accorded to it by an Act of Congress, as an aid to the accomplishment of the Federal policy of an exclusive and plenary authorization that automatically relieved the carrier of all restraint and limitations of law, whether state or federal, and at that time the Commission said (I am quoting from the bottom of page 31)—this language has been referred to earlier but I will mention it to make my statement consecutive:

> "it is difficult to conceive of a restraint or limitation on contemplated unifications better serving to frustrate the national transportation policy than provisions of State laws for compensation of dissenting stockholders on specified bases. The prospect of facing appraisal of any considerable number of minority shares (possibly as much as 49 per cent) well might give pause to potential proponents of any proposal . . . and thus operate to deter contemplated steps toward accom-

plishment of the unification desideratum of the national policy."

[fol. 207] That might have afforded the Commission the basis for it to take a further step and in terms say, "We hereby outlaw appraisal rights under state statute in order to avoid this block in the path of the accomplishment of Federal policy of unification," but it didn't do so.

The Court (Judge Dobie): Does the statute say in the case of one of these mergers that the Interstate Commerce Commission must accord to each stockholder of a particular class the highest type of right that is accorded by any state?

Mr. Gibson: That is the whole point.

The Court (Judge Dobie): There is nothing in the cases or statute that requires that?

Mr. Gibson: There is nothing in the statute law that says so and no decision has ever held so. As a result it is merely a matter of the Commission's administrative settlement of the relative worth of the old securities and new.

The Court (Judge Dobie): And I guess the Commission is fairly well informed about the nature of its rights.

Mr. Gibson: That is its business. May I amplify a statement of other counsel? I think the Commission in weighing the investment worth of the old securities must take into account the relative priorities and the distinctive rights. I don't think counsel meant to deny that. I think what Mr. Kunkel meant to say was only that the Commission has no responsibility to see how the local appraisal laws would [fol. 208] result and how much in dollars and cents would be derived by various proceedings in various states. The point of this observation is that the Commission did not undertake to supersede appraisal statutes, though the C. & O. was entirely willing to see a condition recognizing a right of the plaintiffs to an appraisal under Virginia law. We are perfectly willing to do that and it is our purpose to institute proceedings for that purpose. The Commission found that in reaching the conclusion that the terms and conditions are just and reasonable they have undertaken in effect to give close scrutiny to them because of the majority stock holdings by C. & O., and here are the critical words I wanted to emphasize:

"and, having reached that conclusion, performance of our duty in respect to stockholders is complete, in

our opinion, when we make certain that all stockholders of the same class are to be treated alike."

Judge Dobie observed that it is not sufficient that they be treated equally by all being given nothing. The essential point to the Commission's statement is that having reached that conclusion, that is that the award of new securities is intrinsically just and reasonable, then the performance of their duty is complete by seeing that they are treated alike. What the Commission had in mind, if I may interpret, and I think the meaning is clear, is they wanted to see that there was no penalty. It was the former practice in reorganiza-
[fol. 209] tion technique to drive people into an affirmative vote by penalizing those that resisted and the Commission wanted to be sure to see that equality was offered to all members of a class. That is the meaning of the sentence but it is contingent on the first finding that the award of new securities is just and reasonable. And so, in terms, the Commission left the Pere Marquette preferred stockholders free to pursue any appraisal rights they may have under state legislation. That was the whole finding on the merits—the main points.

After this order of April 1st came down the Schwabachers filed a petition for rehearing. The Commission thereupon entered an order suspending the effective date of the April 1st order until the further order of the Commision and having completed its reconsideration of its rehearing petition another order was entered on May 20th, the one I mentioned at the outset of this hearing, denying the rehearing and ordering that the April 1st order should become effective fifteen days after date which, as we compute, was this morning. So that the Schwabachers are given two weeks in which to institute a suit in this Court if they wished to do so and they didn't do a thing except to write a letter to the Commission on May 23rd, asking the Commission to change its mind and give them a further stay.

The Court (Judge Dobie): The Commission has power to grant a stay?

[fol. 210] Mr. Gibson: I have no doubt. It did so once.

The Court (Judge Dobie): Did they ask them to stay it?

Mr. Gibson: Yes. On May 23rd they wrote a letter asking the Commission to grant a further stay of its own order.

The Court (Judge Dobie): So it could be heard by the court?

Mr. Gibson: Just to make it more convenient for them to get Your Honors here so Your Honors might not have to come back again, but the Commission denied that and only then did the Schwabachers come here asking the same relief.

The Court (Judge Dobie): You will have to commend them for exhausting all of their resources before the Commission.

Mr. Hickey: In fairness to the plaintiff, I think the plaintiff was making an effort to preclude the necessity, if possible, of twice assembling this Court and the Commission, on the other hand, felt that the matters raised by the request for a stay, in fairness to all parties, should be determined by the Court and the Commission has traditionally taken the attitude that if there is going to be a stay the Court for the protection of all concerned should do it and the Commission had no such power, so I believe in fairness to the Court that statement should be made.

Mr. Gibson: I welcome the correction. I was seeking to be fair and if that is a better statement I am very happy [fol. 211] it was made. The point however is that they are here.

On that record and on that administrative background we submit there is no substantial basis in law for the plaintiff to ask any relief from this Court, and I can be more brief I believe with the presentation of our position on the law than in the development of how the case came up.

We have only three points to present. The first one is that the Commission has statutory authority to exercise an administrative discretion over all terms and conditions of a merger agreement, both the matter of public interest and also the matter of relative treatment of security holders; secondly, that having been done by the Commission, the scope of review permissible to any court is merely to determine whether the order presents an error of law and it is not competent for the Court to substitute its judgment for the discretionary conclusions of the Commission on the facts. In the third place, the allocation of new securities instead of a cash award is a typical function of that administrative structure and there is no separate class created by the mere fact of dissent. Those are the only three things in my part of the argument that I should like to comment on. Mr. Shields and perhaps Mr. Kauffman will follow

me, but if I may briefly outline those factors I think it may help Your Honors.

Of course Your Honors recall before 1920 the policy of the Interstate Commerce Act was largely of a policing nature to prevent abuses, but a notable change of policy [fol. 212] was made in that year, perhaps due to the demonstration of our dependence on healthy and efficient transportation during the years of the first World War. The new policy was, as the Supreme Court said in the *Dayton-Goose Creek* case, "affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country" by putting the railroads "more completely than ever under the fostering guardianship and control of the Commission." That is 263 U. S. 456 and the quotation at 478. Two of the most important provisions chosen to implement this policy were, first, Section 5, giving authority over unifications, and Section 20(a), giving similar authority over the issuance of securities and it was repeatedly announced by the Supreme Court that those provisions were to be interpreted and applied with a primary eye to the dominant public interest but that does not mean at all, as Judge Dobie pointed out earlier today, that the Commission's eye was to be focused only on public interest. It had a statutory responsibility to see that fair treatment was accorded security holders. As a matter of fact, the Commission recognized that that was an element of the public interest itself as a prerequisite to the maintenance of railroad credit and Congress made that perfectly clear and amended the law in 1940 by directing (quoting from paragraph 2(b) of Section 5) that the terms and conditions [fol. 213] approved by the Commission must be just and reasonable.

The treatment of security holders in a merger is the most conspicuous set of terms and conditions and is thus clearly within the authority so conferred.

So on that first point we submit clearly and by settled law the Commission has administrative discretion to review and approve all terms and conditions of a merger, both in matters of public interest and in matters of relative treatment of securities.

The second point, the scope of judicial review—of course, the Commission wasn't chosen as the administrative agency to execute these policies for any accidental or ill-chosen reason. It was fundamental to the policy of this new

Federal legislation that it be interpreted and applied by a single administrative agency. Otherwise there could never be derived the advantages that flow from a uniform interpretation throughout the country by an expert body continually informed by experience. So for these reasons the Commission's acts under unification provisions or under security issue provisions were immediately subjected by the courts to the same rule that had already grown up governing the reviewing of orders fixing rates, that the Commission's action be final if based on substantial evidence and in accord with legal standards. That has been recognized as the settled law ever since.

[fol. 214] The first application was the *P. & W. Va. Ry.* v. *I. C. C.* and there the Court of Appeals of the District held that the Commission, acting clearly within its jurisdiction, was called upon to exercise its discretion in a matter depending upon issues of fact, and it is elementary that in such proceeding the judgment of the Commission cannot be reviewed or controlled by injunction. The Supreme Court later announced the same rule authoritatively in the *New York Central Securities* case in 1932. Expositions of that doctrine have been in the recent reorganization cases of *Western Pacific* and the *Milwaukee* case in 1943, the *Rio Grande* case in 1946, and again in '47 those doctrines have been reannounced, and to recapitulate in the words of the Supreme Court, so long as legal standards are followed, the judgment of the Commission is final. That was the pronouncement in 1943. Since that time that same standard has been confirmed by the Administrative Procedure Act.

I have only one point left, I believe, and that is that an award of new securities instead of cash is a typical exercise of the administrative discretion left to the expert judgment of an administrative body. Of course, the purpose of all the statutes of this kind is to confide these complicated and varying questions to the single gaze of an administrative body which can adapt its judgment to the varying circumstances of particular situations and we submit with defer-

[fol. 215] ence that it is unsubstantial or frivolous to suggest that the Commission shall be governed by any absolute rule requiring a cash allocation to people who dissent, in a case moreover where the Commission on evidence before it find that the award of new securities given to the same people is intrinsically just and reasonable. Any contention such as that would undermine the operation of the policy

of the Act. I do not think that authorities are needed in support of that assertion, but if Your Honors would permit, I shall very briefly illustrate by two citations. One of them is under the reorganization Act and the other the Public Utility Holding Company Act.

It was argued in the Milwaukee reorganization in 1943 that the holders of the general mortgage bonds, a very small issue with an underlying lien and very richly secured, were in such position that they were entitled to retain their divisional lien in the new capital structure of the reorganized company or be paid out in cash or its equivalent. But the Commission found that they were not entitled to anything more than a fair and equitable award of new securities and the Supreme Court sustained that holding. The Supreme Court said:

> "... where each group is contributing to a new system mortgage separate properties from old divisional mortgages, it is necessary to fit each into the hierarchy of the new capital structure in such a way [fol. 216] that each will retain in relation to the other the same position it formerly had in respect of assets and of earnings at various levels. If that is done, each has obtained new securities, which are the equitable equivalent of its previous rights ... No fixed rule supplies the method for bringing two divisional mortgages into a new capital structure so that each will retain in relation to the other the same position it formerly had in respect of assets and of earnings at various levels. The question in each case is one for the informed discretion of the Commission and"——

the court went on to add, but only, I submit, because of other provisions, of Section 77 of the Bankruptcy Act,——

> "the District Court."

The same philosophy is applied to proceedings of the Securities and Exchange Commission and the courts reviewing orders under Section 11 of the Public Utility Holding Act. As Your Honors know, that embodies the so-called death sentence in which the Commission dissolved unnecessary holding companies and redistributes——

The Court (Judge Dobie): I think that is pretty well settled.

Mr. Gibson: Without taking the time to quote, I will merely mention the holding of a case that I believe to be helpful. It is the holding of the Third Circuit in the [fol. 217] Standard Gas & Electric Company reorganization in 1945, 151 F. (2d) 326 at 329. The ultimate holding there was that a noteholder, even though he was entitled to cash by the very terms of his security, could nevertheless be satisfied by a fair and equitable award of the new securities and that in measuring the nature and extent of the new securities that are adequate for his satisfaction in that way the Commission is exercising its distinctive administrative technique which is not subject to review or reversal by the court if they acted on evidence and in accordance with legal standards. The only question is one of relative value, the relative value of the old security and the relative value of the new, and cash is merely the best medium of satisfaction. It does not present any distinctive or separate legal issue. This fundamental, we believe, is sufficieent to show this court has no authority here to get aside the Commission's order, the only object of this petition.

As an incident of that may I add with relation to statements made to you in the arguments today that mere dissent by a stockholder does not entitle him to any other or different rights than he would have if he had not dissented. The kind of treatment that is fair and equitable for him or just and equitable for him is determined by the rights of the security he holds and not how he happens to be, whether enthusiastic or opposed. His rights and his position are governed by what he owns and that was distinctly [fol. 218] held by the Supreme Court in the second *Rio Grande* decision this year, *R. F. C. v. Denver & Rio Grande*, 328 U. S. 495 at page 535. The quotation says:

> "If a plan gives fair and equitable treatment to dissenters, the elements which make the plan fair and equitable cannot be the basis for a reasonably justified rejection."

The meaning of that language and the context of its use is that a security holder cannot entitle himself under the Bankruptcy Act, which is concerned with fair and equitable treatment, to get something better than what is fair and equitable by dissenting, and the same philosophy applies, we submit to this Act where the words are "just and reasonable." I see no difference between them.

So on that review, if Your Honors permit, we submit for my part of the argument that these considerations are cited as no legal warrant for this attack on the order of the Commission and the stay should be denied on the ground that the petition is without merit and our motion to dismiss should be granted.

In conclusion, may I invite your attention to one further circumstance, the large interests that are concerned in this merger. There are two railroads serving extensive territory; there are 85,000 stockholders of the two companies who have a natural interest to see a speedy establishment of [fol. 219] their rights. But more immediately and more urgently, a dividend is payable to all C. & O. stockholders who are of record on June 6th, Friday, day after tomorrow. If this merger is consummated by an entry of the order of the Virginia Commission on or before Friday, June 6th, the 2800 stockholders of Pere Marquette will receive their dividends, and if the merger is delayed beyond that date there are legal difficulties that may endanger or defeat their right to obtain that dividend because when the merger is consummated we do not know how it can be consummated retroactively. The Virginia legislation prescribes that it shall be effective at the moment of recording in the office of the Clerk of the Commission.

So it is an important transaction where the rights of so many are concerned and we venture to hope that Your Honors will bear that circumstance in mind as governing the time of the decision and our ability to meet that important deadline. I have told the Commission in Virginia and I have made it clear to counsel for the Schwabachers that unless Your Honors otherwise direct, it is our intention, in behalf of the Chesapeake & Ohio and Pere Marquette, to present the merger agreement to the Virginia Commission at ten o'clock Friday morning, June 6th, and it has agreed to hear us at that time.

Mr. Hickey: May I say a brief word? I am sure that the Court has benefitted greatly *greatly* by the very able and detailed discussion of the facts, but I would like to [fol. 220] emphasize that there has been no challenge to the adequacy or sufficiency of the evidence to support the findings in this ase and the pure issue raised by the complaint, as you can see by reading it, is that the Commission has not discharged a duty plainly imposed upon it by statute.

I would also like to bring this one fact before Your Honors

and that is, as you probably appreciate, the standards under reorganization proceedings, bankruptcy proceedings and liquidation proceedings are quite different from the standards imposed on the Commission here by Section 5(2)(B) and there is imposed a greater scrutiny on the part of the administrative body participating in such proceedings where the focus and objective is securities and the way in which they are handled than in a proceeding under 5(2)(b) where the focus and the objective is the Transportation Act and the public interest.

I would like to make that point because there are cases under reorganization proceedings where a much higher standard of care is set forth by the courts than there would be in cases of this character, and, moreover, I can illustrate that very well by pointing to the fact that when the Commission itself acts in a bankruptcy proceeding it is acting as an adjunct of the court. As Mr. Kunkel brought to your attention, it can be brought before the court in an adjudicatory proceeding, quite unlike a proceeding of this sort.

[fol. 221] Mr. Cooper: I would like to concur in the first statement Mr. Hickey made. It seems to me that the issues are being broadened in this case beyond the terms of the complaint that was filed by the plaintiffs.

STATEMENT OF MR. SHIELDS

Mr. Shields: May it please the Court, John Shields is my name and I speak for the Pere Marquette.

Mr. Kunkel made the point that the Commission was without obligation and without power to deal in collateral matters in treating with mergers and I offer the Court this case: *Missouri Pacific Railroad Co.* v. *United States*, 4 F. Supp. 449, which was affirmed in 293 U. S. 524. The Commission in that case said:

> "Any order that we may issue in this proceeding authorizing the acquisition of control as sought must be based upon a finding that such acquisition of control is in the public interest. It is not within our province to construe the Gould-Huntington Agreement or adjudicate the rights of the parties thereunder. The point here at issue is not whether the Gould-Huntington Agreement is in the public interest, but whether the

acquisition of control as sought is in the public interest. The determination of the status of the parties under this Agreement rests with the courts."

The Court in considering that said this:

[fol. 222] "The sole question which the statute referred to the Commission in disposing of such an application as was before it was whether the granting of it was in the public interest. Possibly it may be said that the public has an interest in a party standing up to his contract and observing a court decree. But it is not such a public interest that the statute had in mind."

After citing some cases the Court further said:

"These cases establish not only that the Interstate Commerce Commission, in determining whether it will exercise a power conferred or perform a duty imposed upon it, has no power to take into consideration collateral matters, such as private rights, but also that the courts in an attack made upon its order may have no power to consider same. The sole question is whether the Commission was empowered or required to make the order and had considered the conditions upon which it was empowered and required to make it and determined that they existed. Indeed, the matter can be pushed further. Even if it were conceded that the Texas & Pacific had rights under the Gould-Huntington agreement which the acquisition of control of the Cotton Belt by the Southern Pacific might result in the violation thereof, the Commission had power to make the orders complained of upon its determina-
[fol. 223] tion that the public interest called for such acquisition."

If it please the Court, the Pere Marquette contends here that the Commission was without jurisdiction to grant what the Schwabachers demand; (2) that there is available to the Schwabachers an adequate remedy at law; (3) that irreparable damage has not been shown; (4) that the Commission's order had substantial evidence to support it and may not be reviewed. I will not cover that last point here because that has not been challenged in the complaint.

The unification of the Pere Marquette and the Chesapeake & Ohio has been in contemplation for a good many years. The Chesapeake & Ohio was permitted by the Commission to acquire operating control of the Pere Marquette in 1929 and it is because of that control by the Chesapeake over the Pere Marquette during these years that the Pere Marquette is the railroad it is today. I dare say that except for that the Pere Marquette would have remained what it was—a streak of rust.

Back in 1945 a unification of the Nickel Plate, Pere Marquette and Chesapeake was negotiated. Minority stockholders, as they have since discovered, didn't like the terms and withdrew, with the result that that unification failed. Thereupon the Chesapeake invited the Pere Marquette to merge and an agrement of merger was entered into in February, 1946.

[fol. 224] On June 8, 1945, while the merger and unification was in the air market-wise, Albert Schwabacher bought 450 shares of Pere Marquette preferred stock. That represents Albert Schwabacher's holdings here. Albert E. Schwabacher, Jr., on June 10, 1946, one month after the stockholders' meeting of Pere Marquette at which this merger was approved, purchased 150 shares and he assumes to be here in court protesting against the merger. The balance of the 2100 shares claimed here is made up by 1500 shares held in the name of a broker and it doesn't appear whether those certificates are the same certificates originally issued or whether they were replaced from time to time and it doesn't appear here when they were purchased. Obviously, if they were purchased on June 10, 1946, at the time when Junior bought his 150 shares, they are out of court because they bought after the stockholders' meeting when they sanctioned the merger.

None of the Schwabachers appeared at our stockholders' meeting and protested. They voted their stock against it but they didn't appear and talk against it. Others did. They didn't appear before the Interstate Commerce Commission at the time testimony was taken. They appeared after the proposed report of the Bureau of Finance was presented.

The Schwabachers, each and every one of them that were stockholders of record, received at the time of the Pere Marquette stockholders' meeting in May, 1946, a copy of [fol. 225] the merger agreement and they were supplied

with quantities of literature. As a matter of fact, another stockholder opposed the merger and solicited proxies against the merger, and so the Schwabachers had not only the material sent out by the company but they had the benefit of the propaganda of the protesting stockholders before them. But they did not come in before the Commission, although they knew from the material at hand that this matter was to be submitted to the Interstate Commerce Commission for approval and had to have the approval of that body.

I don't suppose it makes any difference whether a man owns one share or two thousand; he is entitled to be heard. But it does go to the question of whether the complainants here have suffered irreparable damage.

If the Court please, what is the position of the complainants? Mr. Cooper was not very enlightening. It is clear that they do not oppose the merger. They made it clear in all of their submissions to the Commission that they were in favor of the merger. Their objection is that they are not receiving a sufficiently large participation money-wise.

Schwabacher bought this stock in 1945; his son bought it in 1946. The stock held in the name of the broker was bought we don't know when, but obviously it was bought because there was a large accumulation of unpaid dividends and it was purchased and kept on the gamble that some day [fol. 226] that might be paid. We can tell, may it please the Court, from the submissions to the Commission by counsel for Schwabacher, I think, just what their claim is. They want something which was beyond the power of the Commission to give them. The generous appraisal provisions of the Virginia Code won't satisfy them. If we offered them today a very generous amount for it, which we wouldn't and can't because we think that all stockholders must be treated and should be treated alike, they wouldn't be satisfied with that. They want nothing more or less than par plus accumulated dividends, the accumulated dividends amounting to about $75 or $76 a share. That is what they want and they don't want anything else. That is what the Schwabachers are gambling on in this case.

The Court (Judge Dobie): Does it appear what they paid for that stock?

Mr. Shields: No, it doesn't but the market at that time was fair to middling in their favor.

The Court (Judge Dobie): What do you mean by that?

Mr. Shields: They are in good shape. Their purchase price shows them a profit.

The Court (Judge Dobie): As much as $75?

Mr. Shields: Oh, yes. I don't know what they paid but they paid less than they could have sold their stock for a good many times since this merger began.

Here is what was said before the Commission: "An [fol. 227] attempt is made by the merger agreement to apply the law of Virginia, notwithstanding that no such instrument could modify shareholders' rights or confer jurisdiction, and the applicants are mentioned in the report as suggesting the same as a possible course of action for the Commission, although it is elementary that neither the Commission nor all the parties could confer or transfer jurisdiction. Despite the intimation in the report that Michigan law does not give to dissenting stockholders any rights of appraisal, the Pere Marquette charter here involved provides that 'in the event of any liquidation, dissolution, or winding up, whether voluntary or involuntary, of said corporation, the holders of the preferred stock shall be entitled to be paid in full out of the assets of said corporation the par amount of their shares and all accumulated dividends from and after January 1, 1919, unpaid thereon before any amount shall be paid out of said assets to the holders of the common stock, but the holders of the preferred stock shall not be entitled to any other or further distribution of assets' and it is admitted that there are substantial arrearages on this stock and that the book value is 175 but actually the preferred equity on the date given was 176. That is what the Schwabachers are seeking.

During his oral argument before Division Four Mr. McFarland said this——

The Court (Judge Dobie): Was he counsel for the [fol. 228] Schwabachers?

Mr. Shields: Yes, sir. "It is plain enough, upon the applicant's own admission that the shares of railroad corporations are not held subject to appraisal and a vote of the majority in the State of Michigan. While we do not for a moment concede that this Commission may commit us to the expense of litigation in state courts, if there is any forum, any other forum than the Interstate Commerce Commission, it must be the state or Federal courts of Michigan where these rights were created, where Marquette has its

home and still exists and where there are remedies in equity entirely applicable to this situation."

That was the position which Mr. McFarland in behalf of the plaintiffs here took before the Interstate Commerce Commission. The only difference between Michigan and Virginia on the matter of remedy is that in Virginia there is a special statutory type of thing called an appraisal statute and in Michigan in railroad matters you use the common law equity suits.

"Then we come to the question of whether upon a merger such as this the dissenting preferred shareholders are entitled to be paid either par plus accrued in cash or in securities readily convertible into cash. The Marquette charter provides for such payment in the event of any liquidation, dissolution or winding up, whether voluntary [fol. 229] or involuntary. The proposed report, as the applicants have said, contains some language about the nature of the transaction. It is not entirely a matter of the report but the report is quoting some of the documents in the case. Moreover, the Michigan statute provides in such a situation as this that the corporation that is to survive, in the case of a merger, in such a situation, in other words, all of the rights shall be deemed to be transferred to and vested in such surviving corporation."

"You might look again at the law of Michigan and particularly to the theory of the Michigan law as expounded by the only tribunal entitled to say the last word and that is the Supreme Court of Michigan. They say that the stock dividends and issues of stock in proportion of that previously held by shareholders must stand on the same footing with the original stock. The arrangement allowing consolidation very clearly was intended by the law to leave the Michigan company in its original position as to stock. The Michigan investment can never be less than what it was in the first place."

The Interstate Commerce Commission considered this claim of the plaintiffs, that is, that they were entitled to par, plus accumulated dividends as a matter of contract. They claimed that the articles of association of the Pere Marquette containing what I just read provide that in case of liquidation, dissolution or winding up, the preferred share- [fol. 230] holders participate before the common, that that constitutes a contract on the part of Pere Marquette that in

the case of merger the preferred stockholder will receive par plus accumulated dividends.

The Commission said this:

> "Whether dissenting stockholders, as members of a class created by the merger, are entitled to better treatment under their charter contract with the Pere Marquette is a question not within our province to decide, *Otis & Co.* v. *Pennsylvania R. Co.*, 61 Fed Supp. 905."

If Your Honors please, what the plaintiffs want here is to have themselves set apart as a class by themselves to be distinguished from other stockholders. We didn't have any minority stockholders in this case. The Commission undertook to determine whether the terms of exchange were fair and just to all stockholders.

Where one corporation undertakes to acquire control of another the interests of minority stockholders often appear. For instance, the control may be such as to divert traffic and reduce earnings. There the minority stockholders are entitled to protection and it is the duty of the Commission to furnish that protection. But here it was the duty of the Commission to determine whether the terms of exchange agreed upon, first, by the boards of directors of the two [fol. 231] companies, later sanctioned by the stockholders of the two companies, all in separate meetings, were, first, in the public interest, were just and reasonable, and certain other things that we are not concerned with here.

Mr. McFarland, in his petition for rehearing said this: "The Division had all of the necessary information and details to determine the rights of dissenting groups. Their rights are determined not by negotiation or bargaining but by charter which cannot be altered or changed by the Commission, the legislature or the courts."

That is the position of the plaintiffs here. They intend ultimately to go into court in an action ex concractu to recover as a contract right, or seeking to, the par value of their stock plus accumulations. We submit that the Interstate Commerce Commission was without any obligation and was without any power to make any such arrangement for the particular benefit of these intervenors.

The Michigan statutes, Your Honors, in respect of railroad merger, require this: The Court will please have in mind

that we have two statutes in Michigan. One statute covers the organization of the general corporations, industrial corporations, but railroads are excepted from the operation of that particular statute and they are organized and exist by virtue of a different statute. Under the provisions of that statute if one railroad consolidates or unifies with an-
[fol. 232] other, the merger must be sanctioned by the stockholders. In this particular case the Chesapeake & Ohio held slightly less than 70 per cent of the common stock of Pere Marquette but they owned about 12 per cent, maybe 14 per cent, of the proferred stock and they owned none of the prior preferred stock. In order to carry out the merger it had to have the favorable vote of the majority of each class of stock. To put it another way, unless 51 per cent of the outstanding stock was brought to the meeting and voted favorably for the merger, it failed. The preferred stock or the prior preferred stock, either one, could have defeated the merger. The Commission, notwithstanding the fact that if there was to be a merger or not rested in the preferred stockholders and in the hands of the prior preferred stockholders, said that because the Chesapeake & Ohio does in fact control Pere Marquette we are going to give this proposed merger and the exchange terms a special scrutiny, and they did, and after weighing all of the evidence which was submitted, they found the terms just and reasonable.

If it please the Court, everyone who buys a share of Pere Marquette stock in Michigan buys it knowing that there is a likelihood that the railroad will at sometime or other, somehow or other, become merged or consolidated with another railroad. That is written into the charter of the railway. It is part and parcel of the contract between
[fol. 233] the company and its stockholders. When Schwabachers bought their stock they knew, and I venture to say they hoped, that a merger would one day occur with the Chesapeake & Ohio. The fact that [illegible]unior bought his stock after the stockholders' meeting [illegible]idences that. If a stockholder who holds a share of stock is dissatisfied to go along with the great majority, he can sell his stock for which there is an open, free and ready market, but the Schwabachers are gambling on something else. As they were free to say before the Commission, they are going into Michigan and they are going to institute a suit and claim that there was a contract existing between the Pere Marquette and the Schwabachers, under the terms of which Schwabacher is

entitled to receive par plus accumulations because there is not a merger at all, that it is a dissolution, liquidation and winding up of Pere Marquette.

The Court (Judge Dobie): Are we concerned in any way with what the Schwabachers are going to do when they get back to Michigan?

Mr. Shields: Yes, I think so, Your Honor.

The Court (Judge Dobie): You think that has some bearing on the equities of this situation?

Mr. Shields: I think so. I mentioned that I was not going into the subject of dissolution. I was about to say that whether it does amount to dissolution, a merger is now before this Court and it is something which will have to be [fol. 234] determined later.

The Court (Judge Dobie): Is that the end of the case for the defendants?

Mr. Gibson: Yes, Your Honor.

STATEMENT OF MR. TURNEY

Mr. Turney: If Your Honors please, Turney is my name and I represent about five or six minority stockholders. We have filed a petition for intervention as of right. We own the same stock that the plaintiffs do and about ten times as much. We have assented to the plan and are very anxious for it to be consummated before the 6th because if the plan is not consummated on the 6th the stockholders of the Pere Marquette who have assented will lose some $234,000 in dividends which cannot thereafter be recovered.

The Court (Judge Dobie): You want this plan to go through?

Mr. Turney: Right now, and it means $8500 on Friday morning to my clients on this dividend.

The Court (Judge Dobie): As the American soldiers said in the use of "tout d' suite"—"the touter the suiter."

Mr. Turney: I want to say this on one question that has been discussed. I am not going to reiterate the arguments that have been made here. This is a court of equity. You are called upon to exercise one of the great powers of a court of equity, the power of injunction, and, when you are called upon, one of the cardinal principles is a balancing [fol. 235] of the equities. What are the equities on the other side? You have 98 per cent of the stockholders who have come in here wanting to go through with this transaction. You have two per cent who do not say the trans-

action is bad; they want, they like it; but they want to hold it up unless they are paid.

My clients are not simple. They are business men. They accepted this trade.

The Court (Judge Dobie): You don't mean to say the Schwabachers are simple?

Mr. Turney: Not at all—quite the contrary. But I do say that my people were not suckers that were taken in by the C. & O. or the Pere Marquette. They got a good deal on this trade. It is not only a fair exchange but we think we got the best of it. Be that as it may, we submit that by an injunction here, without any showing of harm at all, and no injury has even been pleaded, we are to be deprived of the fruits of our contract. So I submit that just under the Hornbook rules of equity, regardless of what you do ultimately in the final decision here, the plaintiffs can't be hurt; they still have their remedy to get whatever they can; but we can and we will be hurt.

One other thought in closing: If there is to be an injunction, then we submit that there should be a bond here sufficient to take care of this dividend of $235,000 that is going to be paid and will be lost. We think that is just plain [fol. 236] equity, that these people can't come in here and imperil the rights of all their associates with this proceeding, without assuming the risk of it. So therefore we ask that if there is to be any stay that it be conditioned upon a bond.

The Court (Judge Dobie): How large a bond would you suggest?

Mr. Turney: $250,000. That is about $15,000 in excess of the actual dividend.

These figures and facts are here by affidavit. The pleading which I filed contained all of them and are verified by one of my clients.

I realize I am impinging too far on the time of the Court——

The Court (Judge Dobie): Not at all.

Mr. Turney: But there is this other matter which I submit should appeal to a court of equity. This is not an unusual case where there is a small dissenting stockholder to a merger. There have been these kind of cases in commercial corporations, in railroads, manufacturing corporations, for a hundred years and you will find—at least I have in the short time that I have had to investigate this question

—that the courts uniformly have said when they came to them to stop the merger, "We will not stop the merger if any loss to you can be prevented by the consolidating company insuring you against loss." I can give Your Honors [fol. 237] any number of cases where the courts have said that if the defendant will indemnify the plaintiff against loss by reason of his stock that no injunction will issue to stop the merger. The C. & O. has been pointed out here as certainly a solvent corporation and I think that is somewhat of an understatement, but certainly the rights which these gentlemen admit they have and which every lawyer who has spoken here has said they have and that the Supreme Court has said they have, both at common law and in equity, to secure whatever the value of their interest in the Pere Marquette is, and they are entitled to get that, the C. & O. is able to meet. It is perfectly solvent. They can't be hurt. There can't be any irreparable damage, and in the last analysis there couldn't be any if the C. & O. would give as they have given here today, their assurance that they stand ready to indemnify the plaintiffs against any loss by reason of the consummation of this transaction on Friday morning.

Mr. Gibson: I merely wanted to ask the Court's permission to say that so far as the last statement of counsel goes, we rest on the words we used and we ask that we not be held to assenting to the words he used in clarifying the commitment of the C. & O.

STATEMENT OF MR. HITT

Mr. Hitt: If Your Honors please, I filed a petition to intervene and I haven't a great deal to say. Sterling Grace & Company are investment bankers, Connecticut Mutual [fol. 238] Life Insurance Company and Keystone Custodian Funds did not get their stock from Grandpa or Grandma or old man Pere but they bought it with the idea of getting in the Chesapeake & Ohio. They bought it as a good proposition. They thought that consolidation was eventually coming and they would be able to get terms that would be——

The Court (Judge Dobie): You are in favor of the merger?

Mr. Hitt: Strongly in favor of the merger. The longer the merger is delayed the more we lose. We think the trade made is a very good trade. We don't want to see

that trade upset. We don't want to have it deferred. We want to use the dividends in the meantime.

There is one position that it seems to me has not been brought out too clearly today, that the Commission in its duties to approve mergers upon reasonable terms and conditions must look at it from the standpoint not only of the company being merged but from the standpoint of the company doing the merging. In other words, it would not be fair to require the Chesapeake & Ohio and it would not be in the public interest to pay more than the property is worth that is being acquired. So you have got to look at it from that point of view and it seems to me that has not been brought out as clearly as it should.

There is no contention here, as I understand it, that the [fol. 239] value put upon the Pere Marquette by the Commission is unreasonably low. The complainants in this proceeding apparently are taking the position that they have a contract, that they are entitled in liquidation to 100 cents on the dollar of original par investment plus accumulated dividends. That is not what it is worth now and the problem before the Commission is to determine what the properties are worth at the present time and these investors who hold some 20,000 shares of stock, such as I represent, think that they are getting value for it. They are very well satisfied with the deal and they don't want it reopened because they think it is fair to them and it is fair to the Chesapeake & Ohio and they don't want to take any chances of having it upset, to say nothing of the fact that they have been losing by the delay that has already occurred and they will lose the dividends they are going to get if the plan is longer deferred.

REPLY STATEMENT OF MR. COOPER

Mr. Cooper: Your Honors, this will be very brief.

The Court (Judge Dobie): I would like to ask you one thing. You made the statement at the start that they did nothing for the dissenting stockholders. I would like for you to explain to me what you mean by that in the light of what has been said. They gave them something didn't they?

Mr. Cooper: Not as dissenters.

The Court (Judge Dobie): I understand. You think they should have put on gowns and hoods and conferred the [fol. 240] degree of D. S. on them—Dissenting Stockholder—and give them something they didn't give somebody else? Is that your contention?

Mr. Cooper: I am merely claiming they should have given them something.

The Court (Judge Dobie): Because they are dissenting?

Mr. Cooper: That is right. I can't see how the Commission can perform its duties——

The Court (Judge Dobie): In other words, the Commission ought to say, "We think it is fine but if you don't think it is fine, come in and dissent; you have got nothing to lose, Boys, and you have got everything to gain; we always give dissenters something. Hail to the dissenters!" Is that your position? It is a strange one if it is, Mr. Cooper. If you can get the Supreme Court to sustain it you are going to find yourself on the front page of every paper in America, and maybe you will.

Mr. Cooper: Your Honor, I think dissenting shareholders are a part of the minority interests which the courts have said should be protected.

The Court (Judge Dobie): Not because they are dissenters.

Mr. Cooper: I can't see how the Commission can determine the liability of merged companies until the outstanding obligations of dissenters are handled in some way.

[fol. 241] The Court (Judge Dobie): Here are six hundred stockholders. Four hundred are perfectly well satisfied and the other two hundred come in and dissent and they say the reason they dissent is because their grandfather was born in Scotland. Did you have to give them something for that? I understand you to say, and I want to get you clearly on that, that whether his grounds are good or bad, whether he is a Solomon or an unmitigated ass, as soon as he brands himself as a dissenter, then you have to stand him aside and give him preferential treatment?

Mr. Cooper: No, sir, I do not say that, Your Honor. I say that he is entitled to be given some sort of treatment, whether it is equal, better or less. He is entitled to some sort of treatment. He is entitled to recognition of his liability.

The Court (Judge Dobie): He is entitled to be heard?

Mr. Cooper: Yes, and I think his rights should be determined. I think the fallacy up to this point in most of the arguments of counsel for the defendants has been that it has been assumed that this is a gigantic task that is going to be thrust upon the Interstate Commerce Commission so that they can't perform their duties. As a matter of fact,

it is a very simple matter. It is the merger agreement itself that settled this matter as to what the dissenters were entitled to. The Commission wouldn't have to bat an eye to [fol. 242] handle it. The fault rests in the merger agreement itself, and in some of these cases that I have cited before the Interstate Commerce Commission what happened? When these applications come before them they look them over and if they feel that the minority interests are not protected they send them back and say, "Do the job that you were supposed to do in the first place," and that is no burden on the Commission. It doesn't have to adjudicate thousands of claims. The whole merger agreement should have been buttoned up from the beginning and I would like to explain exactly what I meant—and I think Mr. Hickey put his finger on the problem that as dissenters, entirely apart from the question of what they could get if they wanted to go along with the agreement—there is plenty of that in here—but they want none of the agreement; they are staying outside. What happened? Sometime or other the Pere Marquette is going to have to satisfy those claims. I don't know what they are. I don't know how the court is going to decide and I am not sure that we can get before a court and that is one thing I would like to make plain. When someone says to me that their jurisdiction is primary, plenary and exclusive, I don't think I can take that matter up before another court, and that is precisely what the Commission has ruled in this case. They said that their jurisdiction is primary, plenary and exclusive.

The Court (Judge Dobie): That is as to matters that are properly before them?

[fol. 243] Mr. Cooper: We think that one of the matters properly before them are the rights of the dissenting shareholders and we had to pursue our remedies there.

The Court (Judge Dobie): Nobody can criticize you for asking for what you think you are entitled to before the Commission and asking it from any court.

Mr. Cooper: There is one other point I would like to make on this question of the balancing of the equities. I will be quite frank and I believe that Judge Hutcheson will confirm this statement. When I came to him to ask for the assembling of this Court I did so as much to protect the rights of others as I did to protect our own rights. I felt that this Court should have an opportunity at least to s-ay any

affirmative action which might result in injury to innocent third parties.

The thing I have in mind is if the Court, with the evidence before it, now feels that there is not going to be any injury, that is another matter, but due to the short period of time involved, the three-day holiday when we could not get service on parties, I felt that the safe thing to do was to call it to Judge Hutcheson's attention and to let the Court have an opportunity——

The Court (Judge Dobie): Nobody questioned that you had a perfect right to do that.

Mr. Cooper: It is true, as Mr. Hickey, says, that these decisions speak of minority interests and the protection [fol. 244] of minorities. In this case who are the minority interests? They are common stockholders; they are preferred stockholders; they are prior preference stockholders who did not agree to vote for the merger. In that group is also a group which we can designate as dissenters. They have rights too.

We think that the contract that was negotiated in Michigan under the Michigan statute is a perfectly valid one and it says that on liquidation and winding up they shall be entitled to the par value of their stock plus accumulated dividends, and if the Commission had said that we as dissenters were entitled to less than that I am not complaining or saying that we would have had this appeal. The thing I am saying is the Commission says nothing. It says nothing whatsoever.

The Court (Judge Dobie): It says what you get.

Mr. Cooper: Not as dissenters. We want to have nothing to do with the plan. We want a settlement of some kind.

The Court (Judge Dobie): You are objecting to the merger?

Mr. Cooper: No, sir, and as evidence of that——

The Court (Judge Dobie): You think it is a fine merger provided your men get 100 per cent of all their claims?

Mr. Cooper: In this case all that we are saying is that the Commission failed to make any provision whatsoever of any kind, character or description for the dissenting [fol. 245] shareholders and that remains an outstanding obligation on the part of either the Pere Marquette or the C. & O. and the C. & O. presumably will assume its liabilities and then it becomes a Virginia corporation and we have our problem there as to whether we sue in Virginia or

Michigan and as to whether we can pursue our remedies at all against the Pere Marquette. But the point is, as I tried to emphasize before, I am not saying we should get any better or any less or more. The fact is we were not given assurance of anything—anything whatsoever—and it is an outstanding obligation that someone is going to have to assume. As the Commission points out, it can run as high as ten million dollars and the Commission completely ignores the problem and says it will have to be settled in court somewhere.

How can they perform their duties? How can they approve this until they know what the financial arrangements are going to be? I think that is what the Commission has meant by what it has said in the past and I think that is what the Federal courts have meant when they talked about minority stockholders.

There is one other point: Everybody seems to be agreed now that there is an adequate remedy that we have in the state courts. I am not sure. I think after Your Honors have read the written opinion you will have some doubt too.

The Court (Judge Dobie): The Commission didn't [fol. 246] undertake to pass on that. They didn't say what your rights are or what they are not. Isn't that correct? They said, "Whatever they are, this position doesn't impair them." Is that a fair statement?

Mr. Cooper: I hope it is. Everytime I read the decision——

The Court (Judge Dobie): I sued the word "fair" in the sense of "correct."

Mr. Cooper: I hope that that is true but, as I say, when you read the preface to this first statement in which the statement is made that their jurisdiction over these matters —and that, of course, includes the settlement of these claims—is primary, plenary and exclusive, then I start to get worried about my state remedies.

The Court: (Judge Dobie): They are right strong words.

The Court (Judge Barksdale): If you have got any rights that declaration will not preclude you from asserting them in the Virginia courts.

Mr. Cooper: We happen to have a Michigan contract and I feel quite confident that we would like to insist on our Michigan contract and the statutes of Michigan are quite clear on this matter and I have no doubt——

The Court (Judge Dobie): I am not familiar with the

Michigan statute but if it is, it is one of the very few statutes that are clear.

[fol. 247] Mr. Cooper: We think we have properly interpreted it, Your Honor. I think that is all unless you have any further questions. I hope I have made my point clear.

The Court (Judge Dobie): I think you have made it perfectly clear. We will take a recess for ten minutes and come back.

(A short recess was taken.)

COLLOQUY BETWEEN COURT AND COUNSEL

The Court (Judge Dobie): Gentlemen, we have considered this matter of the temporary stay, which of course should be decided, and we have unanimously come to the conclusion that the stay be not granted.

We are willing to decide this case on the merits if you gentlemen wish it. I believe Mr. Cooper said he had something else that he wished to submit before we could decide it on the merits and, if so, we will be very glad to have him submit that, or anything the other side wishes to submit.

I might say that it is a little difficult to get these three-judge courts together in this part of the world. I don't mean to criticize you, Mr. Cooper; you are perfectly right in asking for one, and it is your duty as a lawyer and you did it manfully and well. It so happens that the Judicial Conference for the Fourth Circuit is going to be held in Asheville next week and Judge Barksdale, Judge Hutcheson and I will be at that conference and we will have ample opportunity there to confer and consider this. How long do you want, Mr. Cooper?

[fol. 248] Mr. Cooper: I am not sure how this could be done. It was the very thing that I was afraid of. There has been a lot of testimony given here today. Mr. Gibson gave us a long story on the history of this merger and the various interests that were involved and Mr. Shields told us a lot about Mr. Schwabacher. We have no evidence on that.

The Court (Judge Dobie): That is not evidence; just the statements of counsel. That is not testimony.

Mr. Cooper: The only other thing which I think you would need, which has been fully covered here, would be the agreement of merger. I don't know whether counsel for defendants will agree with me on that or not but it

seems to me that in order for you to look at what the applicants took to the Commission and then to look at the decision of the Commission as to what they did you will have the whole story, but until you have those two documents——

Mr. Gibson: We will supply those.

Mr. Hickey: The United States and the Interstate Commerce Commission, the only defendants in this case, will agree to that. The intervening defendants have already agreed.

The Court (Judge Dobie): So the only thing you wish submitted then is this merger agreement and you have copies of that that you can give us?

Mr. Gibson: I have one, Your Honor. I can supply tomorrow any number. At the moment I have only one. May [fol. 249] I offer instead of the agreement of merger (the only copy I have is a signed counterpart) a copy of the company's statement to the C. & O. stockholders which includes the merger agreement?

Mr. Cooper: That is satisfactory.

The Court (Judge Dobie): I understand that is all you want before us?

Mr. Cooper: Yes. There is one other statement I wish to make, if I may.

The Court (Judge Dobie): You certainly may.

Mr. Cooper: In the event the Court rules that we have no standing to bring this proceeding and to obtain a permanent injunction enjoining the order, if the Court is of the opinion, as I am, that you would not be passing upon our rights in the state courts, I would earnestly request that that be included in the Court's decision, both that you do not interpret the Commission's decision as deciding our rights under state courts—and I say that because of the language of the opinion—"primary, plenary and exclusive"—and, secondly, that in reaching your decision on our bill that you would not be interpreting any rights that we would have in the state courts.

The court (Judge Dobie): I understand from the other side that you all expressly maintain that, do you not?

Mr. Hickey: We do, Your Honor. The United States [fol. 250] takes the position, as Judge Barksdale put it, that the Commission couldn't foreclose that right anyway, but if the decision is in our favor and we are directed to prepare the order and decree for the Court, we will be glad to include such a statement.

Mr. Gibson: I have already so stated in argment.

The Court (Judge Dobie): I know you did. You stated it very clearly and very forcefully.

Mr. Gibson: We also submit for the case on its merits our motion to dismiss.

Mr. Hickey: In order to save time, since we filed no pleading, this proceeding being for a temporary stay, will the Court permit the United States and the Interstate Commerce Commission to join in the motion to dismiss filed by the railroads?

The Court (Judge Dobie): Is there anything else, Gentlemen?

Mr. Hickey: Does the Court desire any order prepared with respect to the decision made here today?

The Court (Judge Dobie): I think it would be well if you prepare that order and submit it to Mr. Cooper.

Mr. Gibson: May we have the privilege of seeing it before it is submitted?

The Court (Judge Dobie): Yes. I would like all of you to see it. Suppose you submit it to all of them and send [fol. 251] it to [illegible]r. Moran.

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 252] IN UNITED STATES DISTRICT COURT

I Concur. (Sgd.) A. D. Barksdale, U. S. Dist. Judge

ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, JR., James H. Schwabacher, May K. Schwabacher, Ethel S. Sokolow, John L. Schwabacher, Plaintiffs,

versus

UNITED STATES OF AMERICA, and THE INTERSTATE COMMERCE COMMISSION, Defendants

(Argued June 4, 1947)

Before Dobie, Circuit Judge, and Barksdale and Hutcheson, District Judges

Opinion—Filed June 14, 1947

DOBIE, Circuit Judge:

This is a civil action brought by plaintiffs, owners of 2,100 shares of 5% cumulative preferred stock of Pere Marquette Railway Company, to enjoin, set aside, annul or suspend, in whole or in part, an order of the Interstate Commerce Commission approving the merger of the properties and franchises of the Pere Marquette Railway Company into the Chesapeake and Ohio Railway Company for ownership, management and operation.

At a hearing in Alexandria, Virginia, before the three-judge court, we denied the temporary stay sought by plaintiffs. The case is now before us, upon a motion of defendants to dismiss, on its merits. We think this motion must be granted.

Plaintiffs do not seek to set aside the merger, nor do they deny that the merger is in the public interest. They do claim, however, as set out in their complaint: "Failure to include protection for plaintiffs as dissenting shareholders, [fol. 253] as a distinct class created by the merger is contrary to law and a direct violation of the Commission's statutory duty to impose just and reasonable conditions for the protection of all interests involved."

The Transportation Act of 1920, (as amended) Section 5, (49 U. S. C. A. § 5), requires that the terms and conditions of the merger be "just and reasonable." The Commission filed a long and elaborate opinion dealing with all the rele-

vant issues in this case. One peculiarly pertinent paragraph is as follows:

> "Accordingly, considering the Pere Marquette's investment according to its books, other property values, the Company's history as to earnings, its future prospects, and the market appraisal of its stocks, all as set forth above, we find that, as to the stockholders of both parties generally, the proposed ratios of exchange, stock issues and assumptions of indebtedness, are just and reasonable."

Our conclusion is that this finding is within the powers of the Commission, it is based on substantial evidence, and is in accord with accepted legal standards. We think the Commission fully complied with all its statutory duties. That finding is, therefore, binding on us.

Reduced to its lowest terms, the case of the plaintiffs here seems to be based on the theory that dissenting stockholders (quite apart from any merit in the grounds of dissent) are entitled to preferential treatment, more favorable than the treatment accorded to stockholders of the same class (holding the same securities) who did not dissent but agreed to the conditions in the merger agreement; and, as a consequence, if the Commission does not grant such preferential treatment to the dissenting stockholders, a three-judge district court is justified in setting aside or modifying the order of the Commission. We know of no case sustaining this (to us) novel principle. We think, further, this theory has no support in practical economics or in commercial ethics.

As we read the opinion of the Commission, it did not attempt to pass upon what rights, if any, dissenting stockholders might have under the laws of the several States. It specifically left Pere Marquette and Chesapeake and Ohio "free to settle controversies with dissenting stockholders through negotiation and litigation in the courts." We adopt a like course. Nothing in our opinion is to be interpreted as in any way determining, affecting or prejudicing these rights, whatever they may be.

The motion of the defendants is granted and the civil action of the plaintiffs is dismissed.

Dismissed. 6-12-47.

I Concur. (Sgd.) Sterling Hutcheson, U. S. District Judge.

[fol. 254] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING TEMPORARY STAY—Entered & Filed June 4, 1947

This cause having come on for hearing upon plaintiffs' application for a temporary stay or suspension of an order of the Interstate Commerce Commission dated April 1, 1947, in a proceeding entitled "Finance Docket No. 15228, Pere Marquette Railway Company Merger, Etc.", before the undersigned sitting as a duly constituted court of three judges as required by the Urgent Deficiencies Act of October 22, 1913 (28 U. S. C. P47), and all parties in interest having waived the required statutory notice of hearing and agreed that the motion should be heard upon three days notice, and the Court, upon consideration of the pleadings filed herein and the arguments of counsel, having concluded, found and determined that plaintiffs' application for a temporary stay or suspension of the aforesaid order of the Commission should be denied, it is therefore,

Ordered, Adjudged, and Decreed, that the prayer of the complaint that a temporary stay or suspension of the order of the Interstate Commerce Commission dated April 1, 1947, be issued and entered pending final determination of this action be, and it is hereby denied.

This 4th day of June, 1947.

(Sgd.) Armistead M. Dobie, United States Circuit Judge; (Sgd.) Sterling Hutcheson, United States District Judge.

(Sgd.) Alfred D. Barksdale, United States District Judge.

[fol. 255] IN UNITED STATES DISTRICT COURT

Civil Action No. 713

ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, JR., James H. Schwabacher, May K. Schwabacher, John L. Schwabacher, and Ethel S. Sokolow, Plaintiffs,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

FINAL JUDGMENT—Entered & Filed June 16, 1947

This action having come on for hearing on the 4th day of June, 1947, at Alexandria, Virginia, before a statutory Court composed of three judges, upon the pleadings filed herein, and the arguments of counsel, and the Court having duly considered the same, and having filed its opinion herein on June 14th, 1947, it is

Ordered, Adjudged, and Decreed that the above-styled action be, and the same is hereby, dismissed.

(Sgd.) Armistead M. Dobie, United States Circuit Judge; (Sgd.) A. D. Barksdale, United States District Judge; (Sgd.) Sterling Hutcheson, United States District Judge.

June 16, 1947.

[fol. 256] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed July 22, 1947

To the Honorable Armistead M. Dobie, Circuit Judge; A. B. Barksdale, District Judge, and Sterling Hutcheson, District Judge, Comprising Said Court:

Now come Albert E. Schwabacher, Albert E. Schwabacher, Jr., James M. Schwabacher, May K. Schwabacher, Ethel S. Sokolow, and John L. Schwabacher, plaintiffs in the above-entitled and numbered cause, and conceiving themselves aggrieved by the judgment made and entered by the above name Court in the above-entitled cause on the 16th day of June, 1947, wherein the said Court consisting of Armistead

M. Dobie, Circuit Judge; A. D. Barksdale, District Judge, and Sterling Hutcheson, District Judge, under Sections 24, 208, and 209 of the Judicial Code, dismissed plaintiffs' petition to enjoin, set aside and annul an order of the Interstate Commerce Commission theretofore rendered on April 1, 1947, do hereby petition the Court for an appeal to the Supreme Court of the United States from said final judgment and decree, the reasons for which are set forth in the assignments of error which is filed herewith.

Plaintiffs herewith tender a bond in the sum of five hundred dollars, conditioned to pay all costs herein, and pray that the same be accepted and approved. Plaintiffs further pray that a citation issue and a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States at Washington, D. C.

This 22 day of July, 1947.

Robert M. Cooper, McFarland and Sellers, 1302 Eighteenth Street, N. W., Washington, D. C.; William M. Blackwell, Shewmake, Gary, Hardy and Goddin, State Planters Bank Building, Richmond, Virginia, Counsel for Plaintiffs.

[fol. 257] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Entered and Filed July 22, 1947

This day this cause came on for hearing on the application of plaintiffs in the above-entitled and numbered cause, for an appeal to the Supreme Court of the United States from the final judgment rendered in this cause by a specially constituted Three Judge Court, dismissing the plaintiffs' complaint to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission dated April 1, 1947, such final judgment being rendered on June 16, 1947.

And it further appearing that the plaintiffs have tendered a bond in the sum of five hundred dollars, conditioned according to law, which bond is a sufficient bond, conditioned to pay costs of this appeal.

It is hereby ordered, and adjudged and decreed that this appeal is hereby allowed and that a citation issue return-

able in thirty days from the date hereof. It is further ordered that the Clerk of this Court shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States.

(S.) Sterling Hutcheson.

Dated 22 day of July, 1947.

[fol. 258] Cost Bond on Appeal for $500 approved and filed July 22, 1947 omitted in printing.

[fol. 259] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed July 22nd, 1947

Plaintiffs file the following assignments of error on which they will rely upon their appeal to the Supreme Court of the United States from the judgment of this Court entered the 16th day of June, 1947.

The Court erred:

1. In granting defendants' motion to dismiss the complaint.

2. In failing to perpetually enjoin the order of the defendant Interstate Commerce Commission dated April 1, 1947.

3. In holding that the plaintiff's rights were protected by the said order of the defendant Interstate Commerce Commission.

4. In failing to protect the rights of plaintiffs under the order of the defendant Interstate Commerce Comission by requiring defendant Interstate Commerce Commission to set aside its order of approval and to take appropriate action in the premises.

5. In holding that the findings of the defendant Interstate Commerce Commission to the effect that all shareholders were given just and reasonable treatment was based upon substantial evidence and in accordance with the Commission's statutory duty to plaintiffs.

6. In failing to hold that the finding of the Commission to the effect that the assumptions of indebtedness were just

and reasonable was without the support of substantial evidence.

[fols. 260-286] 7. In holding that the jurisdiction of the Interstate Commerce Commission to determine the rights here involved was not plenary and exclusive.

8. In holding that plaintiff's only remedy, if any, was by way of independent litigation in the courts.

9. In holding that plaintiffs were seeking "preferential" treatment before the Commission.

Wherefore, plaintiffs pray that the said judgment be reversed and a judgment rendered in favor of plaintiffs and that plaintiffs have their costs on this appeal.

Robert M. Cooper, McFarland and Sellers, 1302 Eighteenth Street, N. W. Washington, D. C.; William M. Blackwell, Shewmake, Gary, Hardy and Goddin, State Planters Bank Building, Richmond, Virginia.

[fol. 287] IN UNITED STATES DISTRICT COURT

NOTICE TO ATTORNEY GENERAL OF STATE OF VIRGINIA—Filed July 22, 1947

To the Honorable A. P. Staples, Attorney General of the State of Virginia:

Pursuant to the Urgent Deficiencies Appropriation Act of October 22, 1913, Chap. 32, 38 Stat. 219, 220, you are hereby notified that Albert E. Schwabacher, Albert E. Schwabacher, Jr., James M. Schwabacher, May K. Schwabacher, Ethel S. Sokolow, and John L. Schwabacher, the above named plaintiffs, have taken an appeal to the Supreme Court of the United States from the final decree of the specially constituted United States District Court, entered herein June 16, 1947, denying the prayer of said plaintiffs that an Order of the Interstate Commerce Commission, Dated April 1, 1947, approving an application for merger of the Chesapeake & Ohio Railway Company and the Pere Marquette Railway Company, be enjoined, set aside and annul-ed; and that the Order allowing said ap-

peal makes the same returnable in the Supreme Court of the United States thirty days from the date hereof.

Dated at Richmond, Virginia, this 22 day of July, 1947.

(Sgd.) Robert M. Cooper, McFarland and Sellers, 1302 Eighteenth St. N. W., Washington 6, D. C.; (Sgd.) Wm. M. Blackwell, Shewmake, Gary, Hardy & Goddin, State Planters Bank Building, Richmond, Virginia, Counsel for Plaintiffs-Appellants.

[fols. 288-295] IN UNITED STATES DISTRICT COURT

NOTICE TO ATTORNEY GENERAL OF STATE OF MICHIGAN—Filed July 22, 1947

To the Honorable Eugene F. Black, Attorney General of the State of Michigan:

Pursuant to the Urgent Deficiencies Appropriation Act of October 22, 1913, Chap. 32, 38 Stat. 219, 220, you are hereby notified that Albert E. Schwabacher, Albert E. Schwabacher, Jr., James M. Schwabacher, May K. Schwabacher, Ethel S. Sokolow, and John L. Schwabacher, the above named plaintiffs, have taken an appeal to the Supreme Court of the United States from the final decree of the specially constituted United States District Court, entered herein June 16, 1947, denying the prayer of said plaintiffs that an Order of the Interstate Commerce Commission, dated April 1, 1947, approving an application for merger of the Chesapeake & Ohio Railway Company and the Pere Marquette Railway Company, be enjoined, set aside and annulled; and that the Order allowing said appeal makes the same returnable in the Supreme Court of the United States thirty days from the date hereof.

Dated at Richmond, Virginia, this 22nd day of July, 1947.

(Sgd.) Robert M. Cooper, McFarland and Sellers, 1302 Eighteenth St. N. W., Washington 6, D. C.; (Sgd.) Wm. M. Blackwell, Shewmake, Gary, Hardy & Goddin, State Planters Bank Building, Richmond, Virginia, Counsel for Plaintiffs-Appellants.

[fol. 296] IN UNITED STATES DISTRICT COURT

DESIGNATION OF RECORD—Filed July 29, 1947

To the Honorable Clerk of the District Court of the United States for the Eastern District of Virginia:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States pursuant to an appeal in the above-entitled cause, and to include in such transcript the following papers and exhibits:

1. Bill of complaint, including exhibits 1-A, 1-B, 1-C, 2 and 3.
2. Order convening Three-Judge Court.
3. Proxy Statement submitted to Chesapeake and Ohio Railway Company shareholders.
4. Motion to intervene by Chesapeake and Ohio Railway Company, Pere Marquette Railway Company, and Alleghany Corporation.
5. Order allowing such intervention.
6. Motion to intervene by Wellington and Company, et al.
7. Motion to intervene by Sterling, Grace and Company, et al.
8. Order allowing such intervention.
9. Motion to dismiss by Chesapeake and Ohio Railway Company, et al., joined in by the United States of America and Interstate Commerce Commission.
10. Answer of Wellington & Company, et al.
11. Motion to dismiss by Sterling, Grace and Company, et al.
12. Answer of the United States and the Interstate Commerce Commission, if any such answer is a part of the record.
13. Trial proceedings and stenographic transcript of the hearings before this Court.
14. Order denying temporary stay.

[fol. 297] 15. Final judgment entered June 16, 1947.
16. Opinion of this Court.
17. Petition for appeal.
18. Appeal bond.
19. Assignment of errors.
20. Citation on appeal to all parties.
21. Jurisdictional statement.

22. Notice to Attorney General of the Commonwealth of Virginia.
23. Notice to Attorney General of the State of Michigan.
24. Notice under Supreme Court Rule 12, to all parties.
25. Order allowing appeal.
26. Praecipe.

(Sgd.) Robert M. Cooper, McFarland and Sellers, 1302 Eighteenth St. N. W., Washington, D. C.; (Sgd.) Wm. M. Blackwell, Shewmake, Gary, Hardy & Goddin, State Planters Bank Building, Richmond, Virginia, Attorneys for Plaintiffs.

Service of the above and receipt of a copy thereof is hereby admitted this 25th day of July, 1947.

(Sgd.) Edward J. Hickey, Jr., For the United States of America.

Service of the above and receipt of a copy thereof is hereby admitted this 25 day of July, 1947.

(Sgd.) Daniel W. Kunkel, For the Interstate Commerce Commission.

Service of the above and receipt of a copy thereof is hereby admitted this 24 day of July, 1947.

(Sgd.) George D. Gibson, For the Chesapeake and Ohio Railway Company.

[fols. 298-312] Service of the above and receipt of a copy thereof is hereby admitted this 24 day of July, 1947. of counsel on June 4, 1947.

(Sgd.) George D. Gibson, For the Pere Marquette Railway Company.

Service of the above and receipt of a copy thereof is hereby admitted this 24 day of July, 1947

(Sgd.) George D. Gibson, For the Alleghany Corporation.

Service of the above and receipt of a copy thereof is hereby admitted this 25th day of July, 1947.

(Sgd.) John R. Turney, For Wellington & Company, et al.

Service of the above and receipt of a copy thereof is hereby admitted this 25th day of July, 1947.

(Sgd.) Moultrie Hitt, For Sterling, Grace and Company, et al.

[fol. 313] IN UNITED STATES DISTRICT COURT

NOTICE OF CHESAPEAKE & OHIO RAILWAY COMPANY OF FILING OF DESIGNATION OF RECORD ON APPEAL—Filed July 31st, 1947

Please take notice that the undersigned is filing with the Clerk of the District Court of the United States for the Eastern District of Virginia, at Richmond, a designation of additional portions of the record to be included in the record on appeal, a copy of which is attached hereto.

Dated this 30th day of July, 1947.

The Chesapeake and Ohio Railway Company and Alleghany Corporation. By: (s) George D. Gibson, John W. Riely, 1003 Electric Building, Richmond 12, Virginia.

To:

The Attorney General of the United States, Washington, D. C.; Interstate Commerce Commission, Washington, D. C.; Hon. George R. Humrickhouse, Assistant United States Attorney, Richmond, Virginia; John R. Turney, Esq., 1001 15th Street, N. W., Washington 5, D. C., Attorney for Wellington & Company, *et al.*; Moultrie Hitt, Esq., 537 Woodward Building, Washington 5, D. C., Attorney for Sterling Grace and Company; William M. Blackwell, Esq., Shewmake, Gary, Hardy & Goddin, State-Planters Bank Building, Richmond, Virginia, Attorney for Appellants.

[fol. 314] CERTIFICATE OF SERVICE

I hereby certify that I have this day served the annexed Notice of Filing and Counter-Designation of Record upon all counsel to whom said Notice of Filing is directed by causing one copy each of said notice of Filing and Counter-Designation of Record to be deposited in the United States Post Office, postpaid, in envelopes securely sealed and addressed to each of such counsel at his address stated in said Notice of Filing.

(s) John W. Riely, 1003 Electric Building, Richmond 12, Virginia, Attorney for The Chesapeake and Ohio Railway Company and Alleghany Corporation.

Richmond, Virginia, July 31, 1947.

[fol. 315] IN UNITED STATES DISTRICT COURT

DESIGNATION OF CHESAPEAKE & OHIO RAILWAY COMPANY AS TO RECORD ON APPEAL—Filed July 31, 1947

[Title of Court and style of case omitted]

To: The Honorable the Clerk of the District Court of the United States for the Eastern District of Virginia:

You are hereby requested to include in the transcript of record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above-entitled cause, the following papers:

1. The Motion to Affirm, filed on behalf of The Chesapeake and Ohio Railway Company and the Alleghany Corporation;

2. This Counter-Designation of Record.

(s) George D. Gibson, John W. Riely, *Attorneys for The Chesapeak and Ohio Railway Company and Alleghany Corporation.*

Hunton, Williams, Anderson, Gay & Moore, 1003 Electric Building, Richmond 12, Virginia, *Of Counsel.*

[fol. 316] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 317] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE RECORD TO BE PRINTED—Filed August 18, 1947

Now come the appellants in the above-entitled cause and, for their statement of points to be relied upon, adopt their Assignment of Errors and state that the entire Record as certified is necessary to be printed for consideration of those points.

Carl McFarland, Robert M. Cooper, Counsel for Appellants, 1302 Eighteenth St., N. W., Washington 6, D. C.; Moultrie Hitt, 537 Woodward Building, Washington 5, D. C., Counsel for Intervenor Appellees, Sterling Grace & Co., et al.; John R. Turney, 1001 Fifteenth St., N. W., Washington 5, D. C., Counsel for Intervenor Appellees, Wellington & Co., et al.

Service of the above statement of points to be relied upon and designation of the Record to be printed is accepted on or before this 14th day of August, 1947. George T. Washington, M. B., Acting Solicitor General, Department of Justice, Washington 25, D. C.; Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, Washington 25, D. C.; John W. Riely, Hunton, Williams, Anderson, Gay & Moore, 1003 Electric Building, Richmond 12, Virginia, Counsel for Intervenor Appellees, Chesapeake & Ohio Railway Co., Pere Marquette Railway Co. (Of Counsel on June 4, 1947), and Alleghany Corporation.

[fol. 318] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 258

ALBERT E. SCHWABACHER, et al., Appellants,

vs.

THE UNITED STATES OF AMERICA, et al.

ORDER NOTING PROBABLE JURISDICTION—October 13, 1947.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 52,488, Eastern Virginia, D. C. U. S., Term No. 258, Albert E. Schwabacher, Albert E. Schwabacher, Jr., James M. Schwabacher, et al., Appellants, vs. The United States of America, Interstate Commerce Commission, et al. Filed August 12, 1947. Term No. 258 O. T. 1947.

FILE COPY

FILED
AUG 12 1947

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 258

ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, Jr., JAMES M. SCHWABACHER, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

STATEMENT AS TO JURISDICTION

ROBERT M. COOPER,
WILLIAM M. BLACKWELL,
Counsel for Appellants.

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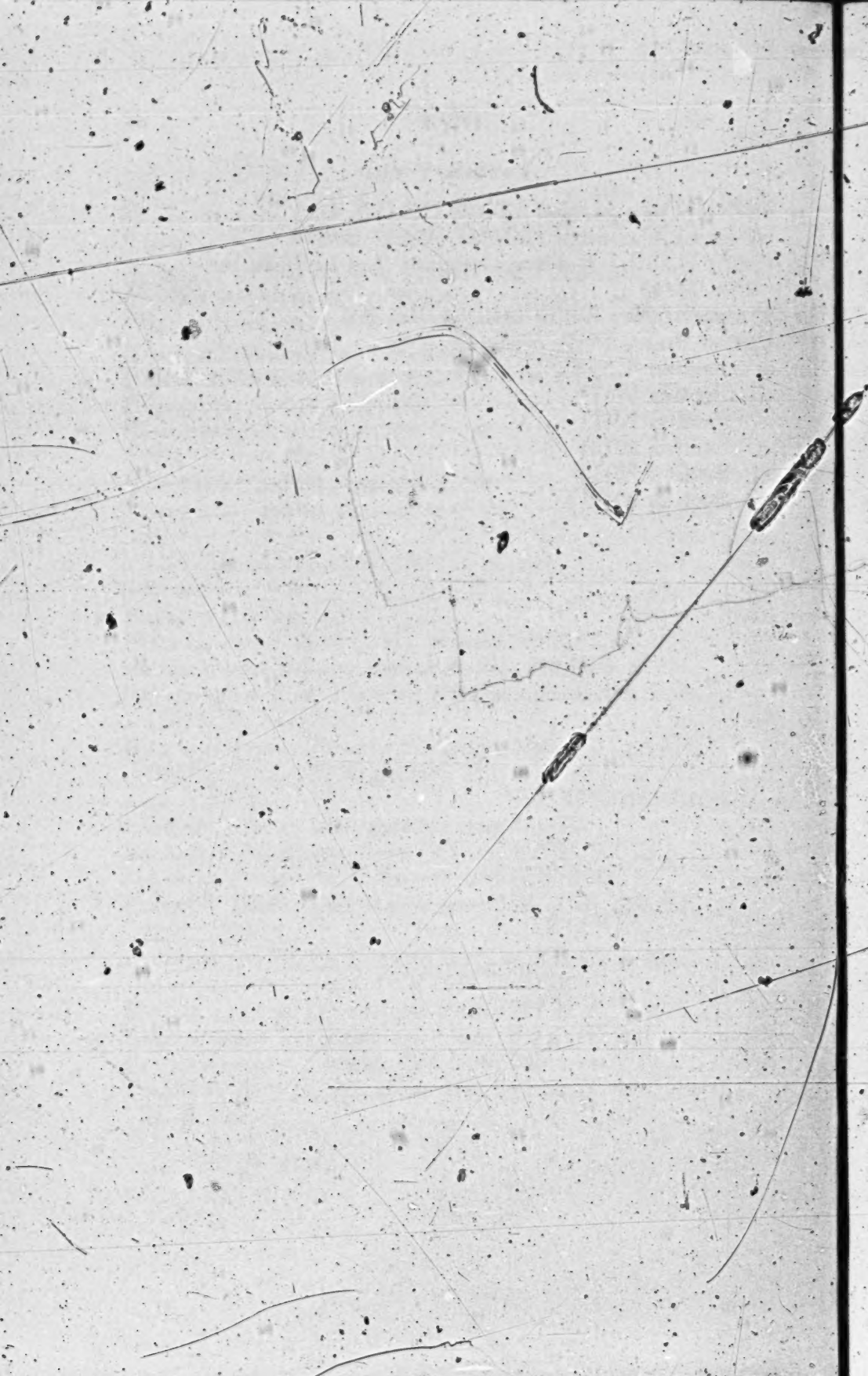
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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 713

ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, Jr., JAMES M. SCHWABACHER, MAY K. SCHWABACHER, ETHEL S. SOKOLOW, AND JOHN L. SCHWABACHER,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, ET AL.,

Defendants.

STATEMENT AS TO THE JURISDICTION OF THE UNITED STATES SUPREME COURT ON APPEAL TO REVIEW THE JUDGMENT IN QUESTION.

The plaintiffs-appellants, having presented this day their petition for appeal, now file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on appeal to review the final judgment and should exercise such jurisdiction in this case.

This appeal is prosecuted from a final judgment which dismissed plaintiffs' complaint seeking to enjoin an order of the Interstate Commerce Commission which approved an application for the merger of the Chesapeake and Ohio

Railway Company and the Pere Marquette Company under the terms of the Interstate Commerce Act, as amended. The grounds for the injunctive relief were that the Commission had failed to perform its statutory duty in approving the proposed merger agreement in that it expressly declined to determine or recognize the rights of dissenting shareholders or to protect their interests.

(A) The Statutory Provision Believed to Sustain the Jurisdiction

The final judgment here appealed from was entered in the District Court of the United States for the Eastern District of Virginia, on June 16, 1947, by a statutory court consisting of one Circuit and two District Judges specially convoked under and by virtue of the provisions of Section 210 of the Judicial Code (28 U. S. C. A., Sec. 47a). That statute contains the following:

> A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decreee . . .

Thereby the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment in question.

(B) The Federal Statutes and Administrative Orders Involved

The plaintiffs' complaint contends that a certain administrative order entered by the Interstate Commerce Commission on April 1, 1947, constituted a violation of the Commission's statutory duty to protect the rights of the dissenting shareholders of the Pere Marquette Railway Company in connection with the approval of the merger agreement re-

ferred to above. The portions of the Interstate Commerce Act (49 U. S. C.), as amended, which are pertinent to the present controversy are as follows (emphasis supplied):

§5. *Combinations and consolidations of carriers.* • • •

(2) *Unifications, mergers, and acquisitions of control.*

(a) It shall be lawful with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties therefore in separate ownership. • • •

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission • • • shall afford reasonable opportunity for interested parties to be heard. • • • If the Commission finds that, subject to such *terms and conditions* and such modifications as it shall find to be *just and reasonable*, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the *terms and conditions, and with the modifications*, so found to be *just and reasonable.* • • •

(11) *Plenary nature of authority under section.*

The authority conferred by this section shall be *exclusive and plenary*, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have *full power* (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the

number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the anti-trust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State. (Sept. 18, 1940, ch. 722, title I, § 7, 54 Stat. 985.)

* * * * * * * *

§20a *Securities of carriers: issuance, etc.*

(2) *Issuance of securities; assumption of obligations; authorization.*

* * * It shall be unlawful for any carrier * * * to assume any obligation or liability * * * in respect of the securities of any other person, natural or artificial * * * unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission * * * of

the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. * * *

(3) *Scope of Commission's authority.*

The Commission * * * may from time to time, for good cause shown, make such *supplemental orders* in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied * * *

(7) *Jurisdiction of Commission as exclusive and plenary.*

The jurisdiction conferred upon the Commission by this section shall be *exclusive and plenary*, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein. * * *

(11) *Securities issued contrary to law void; effect; penalty.*

Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters

preceding the entry of such order of authorization. (Feb. 4, 1887, ch. 104, part I, § 20a as added Feb. 28, 1920, ch. 91, § 439, 41 Stat. 494, and amended Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.)

The final administrative order involved is that of the Interstate Commerce Commission issued on April 1, 1947, designated as Finance Docket No. 15,228, promulgated by Division 4 (Complaint, Exhibit 1-A, Order following sheet 38), as to which petitions for rehearing by the full Commission were denied by order on May 20, 1947 (*id.*).

(C) The Date of the Judgment Sought to Be Reviewed and the Date upon Which the Application for Appeal Is Presented.

The final judgment here sought to be reviewed was entered and spread of record on June 16, 1947.

The petition for appeal herein was presented and filed on July 22, 1947.

(D) Statement Showing That the Nature of the Case and of the Rulings of the Court Was Such as to Bring the Case Within the Jurisdictional Provision Relied upon.

On March 8, 1946, the Chesapeake and Ohio Railway Company and the Pere Marquette Railway Company, together with Alleghany Corporation, applied to the Interstate Commerce Commission for authorization to consummate an agreement of merger between the two railway companies. This application was filed pursuant to the provisions of Section 5 of the Interstate Commerce Act, as amended, relating to voluntary consolidations, mergers or acquisitions of control of rail carriers and Section 20a of said Act relating to restrictions on the issuance of securities and the assumption of liabilities. Prior to the filing of said appli-

cation a majority of the shareholders of each corporation had approved the merger agreement proposed by the companies as required by Section 5(11). Thereafter, plaintiffs as well as other shareholders filed notices of dissent. A hearing was held before an Examiner of the Interstate Commerce Commission on the proposed merger agreement, at which time evidence was introduced for the purpose of justifying the merger in all respects. Following this hearing, a proposed report was issued favoring the applicants. Plaintiffs intervened in the proceeding before the Commission at this point and made their objections known by exceptions to the proposed report and order, by oral argument before Division 4, and—after the Division had made its report approving the merger—by appropriate petition for rehearing which was denied by the full Commission.

Plaintiff duly contended before the Commission that the ratio of stock exchange proposed in the agreement of merger was not "just and reasonable" as those words of section 5(2)(b) required, because the proposed ratio of exchange violated their contractual and statutory rights as the holders of preferred stock in Pere Marquette under the laws of the State of Michigan (Complaint, Exhibit 1-A, Sheet 5) where Pere Marquette was incorporated (until its existence was terminated by the merger here involved; *id.* 11) and pursuant to the laws of which their stock had been issued to and held by them. Their stock was admittedly $100 par value 5 per cent *cumulative* preferred (*id.* 10), *dividends* on which have been in arrears since 1931 in the sum of at least $72.50 (*id.* 29)[1] so that their equity under Michigan law per share was at least $172.50—whereas plaintiffs contended that the merger proposal offered them only $100 in

[1] Now actually $76.25.

value in securities of Chesapeake and Ohio[2] so that their equity would be cut down in the exchange—if the merger were approved—by over $70 per share. It was admitted that the ratio for the exchange of securities was calculated by Chesapeake and Ohio—which controlled and managed Pere Marquette (*id.* 3-4) and had been "preparing" it for years for merger (*id.* 26)—at the going New York Stock Exchange price (*id.* 22-24) without any consideration of the legal equities of the holders of preferred stock whatever. In the Commission proceedings plaintiffs claimed the right to receive, in cash or in equivalent marketable securities (*Geddes* v. *Anaconda Mining Co.*, 254 U. S. 590, 598; *Clearwater* v. *Meredith*, 1 Wall. 25, 39-41), their whole equity in full priority under either or both the corporate charter of Pere Marquette and the merger statute of Michigan.

The charter provision respecting Pere Marquette preferred provides for full payment of par plus accrued unpaid dividends (here amounting to at least $172.50 instead of the $100 offered) "in the event of dissolution, liquidation, or winding up of the company, voluntary or involuntary * * * before any amounts are paid to holders of the * * * common stock" (Complaint, Exhibit 1-A, Sheet 30). Where "stockholders receive their distribution in kind" (that is, in stock) it has been held to be "in fact and law a liquidation of assets" and a "winding up." *Constitutional Co.* v. *United States*, 259 U. S. 156, 177. Likewise, where one Michigan corporation "sells" its assets to a successor, it is a "winding up." *Mason* v. *Pewabic*

[2] See Complaint, Exhibit 1-A, Sheet 25, at which it was estimated, on one basis, that the securities offered in exchange were of a possible value of $111.60. (They are now actually selling on the exchange at under $100.) In par values the Pere Marquette will receive only $90 in new shares of Chesapeake and Ohio (Proxy Statement, pp. 8 and 63). Since among other things Chesapeake and Ohio common was then actually selling at over $50 although of $25 par value, plaintiffs arrived at the $100 approximation.

Mining Co., 133 U. S. 50, 58, 64. Here the merger agreement itself expressly provides that the corporate existence of the Pere Marquette "will cease" on consummation of the merger (*id.* 11); and the Michigan statute expressly provides for only one corporation "to survive in the case of a merger" (Michigan Statutes Annotated § 22.233). Consequently, on this ground plaintiffs insisted throughout the proceedings that the merger agreement should not be approved unless and until provision had been made for the payment to them of their full legal equity per share.

Moreover, it is expressly recognized that the merger is to be accomplished "under the enabling statutes" of Michigan (*id.* 8). The pertinent statute of the latter state permitting Pere Marquette to be dissolved and its property merged with the Chesapeake and Ohio provides, as an express condition, that "the debts, liabilities and duties of either company shall thenceforth attach to such new corporation, and be enforced against the same, to the same extent, and in the same manner, as if such debts, liabilities and duties had been originally incurred by it" (Michigan Statutes Annotated, § 22.234).[3] Similar language has been construed by the Supreme Court of Michigan (in another of its corporation statutes) in *Sutton* v. *Globe Knitting Works*, 276 Mich. 200, 276 N. W. 815 (1936), where a corporation attempted to eliminate by majority vote redemption rights of preferred stock; and it was held that the state legislature had not and could not authorize such a deprivation of such vested contractual rights (pp. 209-210).

[3] The merger agreement evades this language (*id.* 11; and Proxy Statement, Art. II, p. 17). Language similar to that of the Michigan statute quoted in the text was before the Court, and given effect, respecting other forms of liability after a consolidation in *New York, C. & St. L. R. Co.* v. *Frank*, 314 U. S. 360, 361-362; and see both the concurring statement of Mr. Justice Douglass (p. 373) and the Commission's own prior decisions reviewed by Mr. Chief Justice Stone (pp. 384-385).

A fortiori the same is true of rights to accruals of unpaid dividends as here involved.

Plaintiffs therefore contended before the Commission that these contractual rights were beyond the authority of a majority of Pere Marquette to change (*Voight* v. *Remick*, 260 Mich. 189, 204, 205, 244 N. W. 446, cert. denied 289 U. S. 756), that liabilities in this respect must be carried over into a successor corporation upon a merger (as heretofore set forth in the previous paragraph), and that such rights of preferred shareholders are vested and binding upon all tribunals. *Treigle* v. *Acme Homestead Assn.*, 297 U. S. 189, 196, 198; *Hopkins Savings Assn.* v. *Cleary*, 296 U. S. 315, 336, 340-341; *Beford* v. *Eastern Building and Loan Assn.*, 181 U. S. 227, 240. Attention of the Commission was called to the fact that Chesapeake and Ohio had since 1929 controlled Pere Marquette through ownership of approximately 70% of the latter's common stock and had installed common officers and directors (Complaint, Exhibit 1-A, Sheets 3-4), so that the merger proposal was admittedly not an arms-length agreement (*id.* 32) and therefore required that special care be taken to protect minority interests. *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 492; *Geddes* v. *Anaconda Mining Co.*, 254 U. S. 590, 598 *et seq.* Plaintiffs pointed out that both section 5 and section 20a of the Interstate Commerce Act vested the Commission with "exclusive and plenary" jurisdiction with respect to the merger—so that no other forum would have authority to determine the obligation of either the Pere Marquette or its successor, Chesapeake and Ohio, to plaintiffs as preferred shareholders thus denied their full contractual and statutory equity under the law of Michigan.

Nevertheless on April 1, 1947, the final order of the Commission, designated as Finance Docket No. 15228, was

promulgated by Division 4 approving the merger agreement upon the assumption that (Complaint, Exhibit 1-A, Sheet 32, emphasis supplied):

> This does not mean that the Chesapeake & Ohio and the Pere Marquette do not remain free to settle controversies with dissenting stockholders through negotiation and litigation in the courts. * * * *Whether dissenting stockholders, as members of a class created by the merger, are entitled to better treatment under their charter contract with the Pere Marquette is a question not within our province to decide* * * * Objecting stockholders have the right to present their case before two tribunals, both charged with the duty of protecting their interests * * * Possibly the courts may be called upon to determine controversies between dissenting stockholders and their companies. Because of the expense that might be involved, it is necessary that we consider that possibility.

It then concluded that, assuming maximum liability to dissenters to be less than $11,000,000 (*id.*), the sale of stock issuable to them under the merger "together with net current assets to be taken over in the merger, not only should fully reimburse Chesapeake and Ohio, but should exceed substantially, any probable expenditure of cash that it might be required to make in connection with the merger" (*id.* 33).

Following a denial of a petition for rehearing before the full Commission, plaintiffs filed a complaint against the United States and the Interstate Commerce Commission in a specially constituted three-judge District Court of the United States for the Eastern District of Virginia. The Chesapeake and Ohio Railway Company, Pere Marquette Railway Company, and Alleghany Corporation as well as certain shareholders were permitted to intervene in support of the Commission's order. In their complaint plain-

tiffs contended that the Commission had unlawfully ignored its plenary statutory duty to protect their interests as dissenting shareholders and that, since the jurisdiction of the Commission was exclusive under the statute, no other tribunal would be entitled to adjudicate their rights. But the court ruled that no irreparable damage had been shown, denied plaintiffs' request for temporary and permanent relief, and—as the Commission had done—stated that its opinion was *not* to be construed as a ruling on the rights which plaintiffs might have under state law.

It is appellants' contention that the rulings of the court below constitute reversible error in that they not only prejudice but wholly ignore substantial rights of shareholders who have dissented from the merger agreement. Therein important questions of administrative and securities law are presented.

(E) Statement of the Grounds upon Which It Is Contended That the Questions Involved Are Substantial

The basic question involved is whether, since the statute provides that the jurisdiction of the Commission is not only "exclusive" but "plenary" both with respect to the approval of mergers (section 5) and the assumption of liabilities with respect thereto (section 20a), the Commission unlawfully found it "not within our province to decide" whether plaintiffs' legal equities as holders of preferred stock had been treated fairly in the merger exchange. Since the equities were not even considered in either the merger agreement or the Commission's opinion save as the latter mentioned them only in holding them irrelevant, the issue here is whether the Commission should have determined what they were and either have rejected the application for merger for failure to satisfy them or have

conditioned approval upon appropriate satisfaction of such equities.[4]

The question is basically statutory.[5] In section 5 of the Interstate Commerce Act, Congress need not have specified that it conferred "exclusive" jurisdiction, for that would have followed *sub silentio* to the extent that authority was actually conferred upon the Commission.[6] Even the precise terms indicating the extent of authority conferred need not be examined here[7] because here, unlike other statutes, it is expressly provided not only that the authority is "exclusive" but that it is "plenary." The latter means "full; entire; complete; absolute" according to common dictionaries. It is difficult to conceive, therefore, how upon this broad, unequivocal, and express language any-

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[4] Section 5(2)(b) of the statute not only expressly authorizes the Commission to impose terms and conditions but section 20a(3) authorizes the Commission to issue supplemental orders at any time "for good cause."

[5] Of course, if the statute were to be held to permit the Commission to wipe out shareholders' rights notwithstanding there were adequate funds to satisfy them and the merger was wholly voluntary, constitutional issues would arise as indicated in the *Treigle* and other cases heretofore cited and the saving clause of section 5(12) of the statute would be brought into operation. But the Commission took no such ground. Even if it had a discretion, it declined to exercise it. *Cf. Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 194.

[6] See, for example, *Rice* v. *Santa Fe Elevator Corp.*, Nos. 470 and 472, U. S. Supreme Court, decided May 5, 1947; *Rice* v. *Board of Trade of City of Chicago*, U. S. Supreme Court, Nos. 471 and 473, decided May 5, 1947; *Bethlehem Steel* v. *New York State Labor Relations Board*, U. S. Supreme Court, Nos. 55 and 76, decided April 7, 1947; *Mayo* v. *United States*, 319 U. S. 441; *Penn Dairies* v. *Milk Control Commn.*, 318 U. S. 261; *Parker* v. *Brown*, 317 U. S. 341; *Cloverleaf* v. *Patterson*, 315 U. S. 148.

[7] See the cases mentioned in note 6 *supra*. Although many functions of the Interstate Commerce Commission are provided by statute without specification that they shall be "exclusively" performed by the Commission, the Supreme Court has said that "an action before the Interstate Commerce Commission is akin to an inclusive equity suit in which all relevant claims are adjusted." *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 142. See also *Transit Commission* v. *United States*, 289 U. S. 121, 129, in which authority over acquisition of trackage rights is held "paramount and * * * necessarily exclusive."

thing can be left to any other forum or tribunal; and neither the Commission nor the court below has done more than assume the contrary.

The Commission's report not only disclaims "province" to determine the substantial question here involved but inconsistently states that "objecting stockholders have the right to present their case before two tribunals, both charged with the duty of protecting their interests" (Complaint, Exhibit 1-A, Sheet 32)—whereas the first and administrative tribunal has itself here said it is without jurisdiction. Although it acknowledges that "Congress always has had regard for private property involved by requiring us to consider the terms and conditions of unification proposals" (*id.* 31), it finds that that issue in this case "is a question not within our province to decide" (*id.* 32). Although it states that "it is difficult to conceive of a restraint or limitation on contemplated unifications better serving to frustrate the national transportation policy than the provisions of state laws for compensation of dissenting stockholders on specified bases," it invites the parties here "to settle controversies • • • through • • • litigation in the courts" (*id.* 32).

Similar difficulties are shown in the Commission's treatment of its duty under section 20a, where it does not disclaim authority but seeks to satisfy its obligation by approving in advance and in an indeterminate amount the possible liability of the carriers concerned in the event of successful independent stockholders' suits (*id.* 32). The figures there given, and the means assumed to be sufficient to satisfy such liability (*id.* 33), are based upon no real examination into shareholders' rights and remedies because they are limited to such figures as happen to appear in the record documents respecting dissenters (*id.* 32) and the even smaller number of shareholders who have requested the special statutory remedy of appraisal under Virginia statutes (*id.* 33, note

14). But the limitation of potential liability to those who have dissented, or those who have sought such appraisal, is an unwarranted assumption. If, for example, the remaining vast majority of shareholders can show rights of recovery because of representations made in the proxy statements, the fact that they failed to dissent from the merger may be immaterial.[8] The suggested limitation of recovery to those who have sought appraisal under Virginia statutes is utterly immaterial so far as shareholders of Pere Marquette are concerned, because the latter hold under Michigan law.

The Commission has therefore wholly failed to exercise its "exclusive and plenary" jurisdiction with respect either to the merger agreement (section 5) or the assumption of liabilities in connection therewith (section 20a). On the other hand the statute speaks for itself and requires more of the Commission in either and both cases. Not only has the Commission not so limited its jurisdiction in the past but it has heretofore uniformly taken the contrary posi-

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[8] Under the heading "Statutory Rights of Dissatisfied Stockholders" the Proxy Statement reads (p. 14), "The statutes of Michigan contain no provision dealing with this subject." In this connection two official publications of the Government of the United States deal with the similar problems arising in an earlier phase of the creation of the augmented railroad system here involved. In 1938 the Securities and Exchange Commission issued its report on *Reorganization Committees pursuant to section* 211 of the Securities Exchange Act of 1934. It treats of "plans designed to eliminate arrearages of accumulated dividends on preferred stock" (pp. 109-197), the "elimination of minorities by dissolution, merger or consolidation of other companies" (pp. 294-335), and the "inadequacy of protection afforded minorities by appraisal statutes" (pp. 342-352). It reviews at length the basic rights of shareholders, under state law, on the merits of the controversy here involved. It reviews extensively the "plan of consolidation for the Alleghany Corporation and The Chesapeake Corporation," including the judicial correction (under Maryland law) of the attempt to wipe out accruals on preferred stock and "non-disclosure in soliciting material" (pp. 353-411). See on the same subject Part 10 of the *Investigation of Railroads, Holding Companies, and Affiliated Companies*, Senate Hearings pursuant to S. Res. 71, 75 Congress (1937).

tion[9] and Congress has amended and reenacted the statute without any other understanding (Transportation Act of 1940, 54 Stat. 905).

Because the statute is plain and because the Commission has not heretofore declined to exercise its exclusive and plenary jurisdiction, the Federal courts have not been called upon to determine the precise question here involved. But the Supreme Court of the United States has plainly indicated that "exclusive and plenary" means nothing less than primary and complete.[10] In *Thompson* v. *Texas Mexican Ry. Co.*, 328 U. S. 134, 146-150, the Court held that under section 5(2)(a) of the statute here involved the Commission and "not the courts" had exclusive authority to determine

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[9] "We are not impressed by these reasons for the failure to prepare and announce a plan for the protection of minority stock interests. Before we can approve an acquisition of control under paragraph (2) of section 5 we must find that the terms and conditions on which it is to be effected are 'just and reasonable in the premises.' They are not just and reasonable unless they include proper provisions for the protection of minority interests and we can not say that the provisions to be made for such protection are proper until we know what they are, nor prescribe proper provisions in the absence of adequate evidence which will enable us to determine what they ought to be." Unification of Southwestern Lines, 124 I.C.C. 401, 434. See also Nickel Plate Unification, 105 I.C.C. 425, 447-448; New York Central Unification, 150 I.C.C. 278, 320; Denver & St. L. Ry. Co. Control, 252 I.C.C. 153, 195. And see Cleveland, C. C. & St. L. Ry. Co., 22 F. 2d 509, 511 (CCA 6) for a judicial confirmation of this view. See also *United States* v. *Lowden*, 308 U. S. 225, note 1 at 233.

[10] The only distinction is drawn in those cases (1) where the issue raised is a claim of *ultra vires* under state law which is "remote" in the sense that only the state may raise it (*N. Y. Central Securities Co.* v. *United States*, 287 U. S. 12, 26; *Cleveland etc. Ry.* v. *United States*, 275 U. S. 404, 413-414; relying on *Kerfoot* v. *Farmers' & Merchants' Bank*, 218 U. S. 281) or (2) the shareholder's cause of action is not directly related to the merger transaction (*N. Y. Central Securities Co.* v. *United States*, *supra*, 28-29, 54 F. Supp. 122 at 131; *Pittsburgh & West Virginia Ry. Co.* v. *United States*, 281 U. S. 479, 488, 41 F. 2d 806 at 811). Here, on the other hand, the State of Michigan is at least not the sole party in interest and the merger exchange-of-stock ratio was a principal issue in the merger agreement, in the proceedings before the Commission, and in the court below. Neither of those tribunals raised the slightest question that plaintiffs were proper parties there.

the terms and conditions under which trackage rights may be acquired notwithstanding that they "are consensual arrangements between the parties." In *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 77-79, the Federal antitrust authorities were required to present antitrust questions to the Commission in a merger proceeding.

If the issue here presented is one within the "exclusive and plenary" jurisdiction of the Commission as the statute and the foregoing authorities indicate, then manifestly and admittedly the Commission has unlawfully failed to accord plaintiffs their rights as holders of cumulative preferred stock in Pere Marquette. It has been said by the Supreme Court on many occasions that the priorities of various classes of shareholders under a corporate charter must be recognized by courts and agencies which deal with the earnings or assets of their companies. *Otis & Co. v. Securities & Exchange Commission*, 323 U. S. 624, 634. The duty of the Interstate Commerce Commission under section 5(2) of the Interstate Commerce Act to determine the justness and fairness of merger plans is of the same type as that of the Securities and Exchange Commission under section 11(e) of the Public Utilities Holding Company Act of 1935 to determine the fairness and equitableness of simplification plans. In passing on action by the Securities and Exchange Commission involving a simplification plan, the Supreme Court has held that any arrangement or plan enforced without the consent of the parties affected by it, by which the subordinate rights and interests of stockholders are attempted to be secured *at the expense of the prior rights of other security holders*, is unfair and inequitable and will not be judicially sanctioned. In the *Otis* case cited above the Court said (p. 634):

> Like the bankruptcy and reorganization statutes, the Public Utility Holding Company Act, in providing that plans for simplification be "fair and equitable," incor-

> porates the principle of full priority in the treatment to be accorded various classes of security interests. This right to priority in assets which exists between creditors and stockholders, exists also between various classes of stockholders. When by contract as evidenced by charter provisions one class of stockholders is superior to another in its claim against earnings or assets, that superior position must be recognized by courts or agencies which deal with the earnings or assets of such a company. Fairness and equity require this conclusion.

Under this principle of full priority no plan of merger or reorganization in which junior security holders are permitted to participate could be approved or permitted to stand unless senior security holders received full compensation for their prior rights as established by their contract. This rule has also been consistently applied by the Supreme Court in reviewing actions by the Interstate Commerce Commission in railroad reorganizations. *Case* v. *Los Angeles Lbr. Co.*, 308 U. S. 106; *Consolidated Rock Products Co.*, v. *Du Bois*, 312 U. S. 510; *Group of Investors* v. *Milwaukee Ry. Co.*, 318 U. S. 523.

The current proceedings—which already involve action by the Commission, three-judge court review, an appraisal proceeding subsequently initiated by Chesapeake and Ohio in the local courts of Virginia, this appeal, and an invitation by the Commission for plaintiffs to undertake an independent action in equity under the laws of Michigan—all demonstrate how completely the "exclusive and plenary" jurisdiction which Congress has conferred upon one Federal administrative tribunal will be complicated, confused, and frustrated. Should a bifurcated or trifurcated jurisdiction be approved by the Supreme Court, the cause of unification of carriers for the benefit of the National Transportation Policy will be ill served because many questions

will border on the several jurisdictions and require a multiplicity of proceedings which can only serve to deter unifications. The questions presented here are therefore both substantial and important.

(F) Statement Respecting Opinion

The court below delivered an opinion in connection with its entry of the final judgment in this proceeding. Copies of the final judgment and opinion are attached hereto and are made part of this jurisdictional statement.

Respectfully submitted,

ROBERT M. COOPER,
McFarland and Sellers,
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Washington 6, D. C.,

WILLIAM M. BLACKWELL,
Shewmake, Gary, Hardy and Goddin,
State Planters Bank Building,
Richmond, Virginia.

APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

CIVIL ACTION NO. 713

ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, JR., JAMES H. SCHWABACHER, MAY K. SCHWABACHER, JOHN L. SCHWABACHER, AND ETHEL S. SOKOLOW,

Plaintiffs,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

Defendants.

Final Judgment

This action having come on for hearing on the 4th day of June, 1947, at Alexandria, Virginia, before a statutory Court composed of three judges, upon the pleadings filed herein, and the arguments of counsel, and the Court having duly considered the same, and having filed its opinion herein on June 14th, 1947, it is

Ordered, adjudged, and decreed that the above-styled action be, and the same is hereby, dismissed.

(Sgd.) ARMISTEAD M. DOBIE,
United States Circuit Judge.
(Sgd. A. D. BARKSDALE,
United States District Judge.
(Sgd.) STERLING HUTCHESON,
United States District Judge.

June 16, 1947.

APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

C/A No. 713

ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, JR., JAMES E. SCHWABACHER, MAY K. SCHWABACHER, JOHN L. SCHWABACHER, AND ETHEL S. SOKOLOW,

Plaintiffs,

vs.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

Defendants.

(Argued June 4, 1947. Decided —— ——)

Before Dobie, Circuit Judge, and Barksdale and Hutcheson, District Judges

DOBIE, Circuit Judge:

This is a civil action brought by plaintiffs, owners of 2,100 shares of 5% cumulative preferred stock of Pere Marquette Railway Company, to enjoin, set aside, annul or suspend, in whole or in part, an order of the Interstate Commerce Commission approving the merger of the properties and franchises of the Pere Marquette Railway Company into the Chesapeake and Ohio Railway Company for ownership, management and operation.

At a hearing in Alexandria, Virginia, before the three-judge court, we denied the temporary stay sought by plaintiffs. The case is now before us, upon a motion of defend-

ants to dismiss, on its merits. We think this motion must be granted.

Plaintiffs do not seek to set aside the merger, nor do they deny that the merger is in the public interest. They do claim, however, as set out in their complaint: "Failure to include protection for plaintiffs as dissenting shareholders, as a distinct class created by the merger is contrary to law and a direct violation of the Commission's statutory duty to impose just and reasonable conditions for the protection of all interests involved."

The Transportation Act of 1920, (as amended) Section 5, (49 U. S. C. A. § 5), requires that the terms and conditions of the merger be "just and reasonable." The Commission filed a long and elaborate opinion dealing with all the relevant issues in this case. One peculiarly pertinent paragraph is as follows:

> "Accordingly, considering the Pere Marquette's investment according to its books, other property values, the Company's history as to earnings, its future prospects, and the market appraisal of its stocks, all as set forth above, we find that, as to the stockholders of both parties generally, the proposed ratios of exchange, stock issues and assumptions of indebtedness, are just and reasonable."

Our conclusion is that this finding is within the powers of the Commission, it is based on substantial evidence, and is in accord with accepted legal standards. We think the Commission fully complied with all its statutory duties. That finding is, therefore, binding on us.

Reduced to its lowest terms, the case of the plaintiffs here seems to be based on the theory that dissenting stockholders (quite apart from any merit in the grounds of dissent) are entitled to preferential treatment, more favorable than the treatment accorded to stockholders of the

same class (holding the same securities) who did not dissent but agreed to the conditions in the merger agreement; and, as a consequence, if the Commission does not grant such preferential treatment to the dissenting stockholders, a three-judge district court is justified in setting aside or modifying the order of the Commission. We know of no case sustaining this (to us) novel principle. We think, further this theory has no support in practical economics or in commercial ethics.

As we read the opinion of the Commission, it did not attempt to pass upon what rights, if any, dissenting stockholders might have under the laws of the several States. It specifically left Pere Marquette and Chesapeake and Ohio "free to settle controversies with dissenting stockholders through negotiation and litigation in the courts." We adopt a like course. Nothing in our opinion is to be interpreted as in any way determining, affecting or prejudicing these rights, whatever they may be.

The motion of the defendants is granted and the civil action of the plaintiffs is dismissed.

Dismissed.

I concur.

(Sgd.) STERLING HUTCHESON,
U. S. District Judge.

6-12-47.

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IN THE

Supreme Court of the United States

October Term 1947

No. 258

ALBERT E. SCHWABACHER, ET AL.,
Appellants

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

APPELLANTS' BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

The issue in this case is whether, in approving a privately formulated plan for the acquisition of the Pere Marquette Railroad by the Chesapeake & Ohio Railroad through the exchange of stock of the latter for that of the former, the Interstate Commerce Commission properly held itself to be *without* jurisdiction to determine whether the full prior equity of dissenting preferred shareholders in Pere Marquette had been satisfied in the exchange—despite the fact that the statute under which the Commission was acting expressly provides that its jurisdiction in such cases shall be not only "exclusive" but "plenary."

Motions to affirm have been filed by the Government (United States and Interstate Commerce Commission) and

the carriers (Chesapeake & Ohio Railway Company and Allegheny Corporation). The former states the issue and merely asserts, without argument, the correctness of the position taken by the Interstate Commerce Commission and the court below. The latter misrepresents the issue.

THE GOVERNMENT'S MOTION STATES NO GROUND FOR AFFIRMANCE

The motion of the United States and the Interstate Commerce Commission "submits" that the position of appellants "is without merit" because, it is said,

> It seems clear that the Commission can properly decline to arbitrate or adjudicate *private disputes* between dissenting stockholders or between the former and the corporation, where in the *judgment* of the Commission no considerations of *national transportation policy* are involved. (Emphasis supplied)

That there are here characteristics of a "private dispute" has no relevance if Congress intended and provided that the Interstate Commerce Commission should be, as it has said in the statute, the "exclusive and plenary" authority to determine the controversy. More often than not Congress has placed such controversies in the exclusive jurisdiction of federal administrative agencies. Examples are the National Labor Relations Board, Employees' Compensation Commission, and the Interstate Commerce Commission in such functions as the issuance of reparation orders or the approval of bankruptcy reorganization plans.

Nor, since it is undeniable that the Commission is the "exclusive" tribunal with "plenary" powers, does it lie in the "judgment" of the Commission to take or refuse jurisdiction, for the reason that Congress—which created the Commission and determines its jurisdiction and powers—has expressly provided otherwise. Moreover, here the Commission did *not* hold that its jurisdiction was merely discretionary but, on the contrary, that the issue

was absolutely "not within our province to decide". The Government motion takes the position that it is not "an inexorable obligation" of the Commission to take jurisdiction of such an issue in approving a merger plan in which the issue is embedded; but the Commission itself, on the contrary, has taken the position that it is its "inexorable obligation" *not* to take jurisdiction of that issue. In fact four views are presented:

(1) The Commission's view is that it is entirely without jurisdiction of such an issue. The Court below concurred.

(2) Appellants' contention is that the Commission has, as the statute states, "exclusive and plenary" jurisdiction of the issue.

(3) The Government's motion to affirm takes two different grounds. The first is to the effect that the Commission has a discretion in the matter. But even if the latter position were correct despite the unequivocal words of the statute, still the Commisison itself has assumed that it is wholly without discretion and hence the cause must be reversed in order that it shall exercise that discretion. *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 194; *Siegel Co. v. Trade Commission*, 327 U. S. 608, 614. *Cf. United States v. Carolina Carriers Corp.*, 315 U. S. 475, 488-489.

(4) The Government motion in another passage assumes, in addition to discretionary jurisdiction as to issues like the present one, that the absolute jurisdiction of the Commission attaches only to "issues involving transportation factors." But the statute does not so divide the subject, and the subject cannot practicably be so divided. The statute requires merger plans to be "just and reasonable." Like the words "fair and equitable" used in the Public Utility Holding Company Act, these words incorporate the principle of full priority to be accorded senior securities. *Cf. Otis & Co. v. Securities & Exchange Com-*

mission, 323 U. S. 624, 634. That "consensual arrangements" of primary interest to private parties are involved is immaterial. *Thompson v. Texas Mexican Ry. Co.*, 328 U. S. 134, 146-150. To disperse jurisdiction as to issues other than those in the vague category involving "transportation factors", would be impractical because the issues are inevitably interwoven as this Court held in the *Thompson* case, *supra*. Moreover, to disperse jurisdiction would not foster a national transportation policy looking toward the consolidation of carriers into regional systems because each consolidation would then require multiple drawn-out proceedings.

Other suggestions in the Government motion are either irrelevant or unfounded or both. Quoting the opinion of the court below, it is suggested that appellants here seek preferential treatment "quite apart from any merit in the grounds of dissent". That not only has never been the position of appellants but neither the Commission nor the court below has—despite appellants' urging—determined the merit of the grounds of dissent. The issue in these proceedings has always been whether the Commission or the court below *should* determine the merits; and each of them has declined to do so. The only significance of the word "dissenters" is that those who have dissented have preserved their rights, whereas assenters might be precluded from contesting the plan. What the court below intended by the above-quoted words appellants do not know, for the court below also went on to say:

> As we read the opinion of *the Commission*, it *did not attempt to pass upon what rights, if any, dissenting stockholders might have* under the laws of the several states. It specifically left Pere Marquette and Chesapeake & Ohio "free to settle controversies with dissenting stockholders through negotiation and litigation in the courts." *We adopt a like course.* Nothing in our opinion is to be interpreted as in any way determining, affecting or prejudicing these rights, whatever they may be. (Emphasis supplied.)

Moreover, at the argument of the case before the court below it was conceded that the issue was whether the prior equities of the dissenting stockholders of Pere Marquette should have been recognized in the exchange of stock provided under the plan of merger (Tr. pp. 52, 58, 77-85, 90). The Commission, the court below, and the appellees have simply taken the course of avoiding jurisdiction as to the merits on the ephemeral ground that some other tribunal in some other place and at some other time has it.

Again, the Government motion states that the Commission "carefully analyzed the proposed exchange ratio of Chesapeake & Ohio securities which were to supplant securities of the Pere Marquette" and quotes the ultimate conclusion of the Commission to the effect that the "proposed ratios of exchange * * * are just and reasonable". But the Commission expressly declined to inquire whether any class had been accorded its full priority for, as the Government motion concedes in the next paragraph, the Commission held only that its duty was "complete * * * when we make certain that all stockholders of the same class are treated alike". In other words, in the Commission's view, its jurisdiction falls short where a wrong is uniformly applicable to all members of a class of security holders although it might not be without jurisdiction if only part of the class were wronged. Certainly the statute makes no such esoteric division of jurisdiction. It is true that the dissenting holders of preferred stock in Pere Marquette are not treated any worse than the assenters and that, as the Government motion states, "thus the Commission undertook to prevent any discrimination against non-assenting minorities." But the question here is not whether dissenters were treated worse than assenters; but whether, since the dissenters have preserved their rights by not agreeing to the merger plan, they are entitled to have the Commission determine their rights and make appropriate provision therefor in supervising the merger.

It would serve no purpose here to explore prior decisions of the Commission as invited by the conclusion of the Government motion. Those decisions speak for themselves (see note 9 of the Statement of Jurisdiction). Moreover, the question here is a statutory one and, in that connection, it is to be noted that the words "exclusive and plenary" were not added to section 5 until the Transportation Act of 1940. Undoubtedly the real ground for the Commission's position rests upon ideas of administrative convenience or practicality but, if so, neither this Court nor appellants have been accorded the benefit of any form of statement of them. Even if stated they could hardly warrant a whittling down of the exclusive and plenary jurisdiction which the statute requires the Commission to assume and exercise.

To conclude—as does the Government motion—that the Commission "properly left Pere Marquette and Chesapeake & Ohio 'free to settle controversies with dissenting stockholders through negotiation and litigation in the courts' " is a bald and shocking departure from the conception of administrative jurisdiction which this Court has fostered even where statutes do not expressly provide for either "exclusive" or "plenary" administrative jurisdiction (see note 6 of the Statement of Jurisdiction). No supporting reasons are given for such a result. A partial rationale is suggested, distinguishing between "transportation factors" and others, but the Commission did not and could not make any such distinction. Had it done so it would not have been concerned about shareholders rights in any respect, whereas in fact it has considered all such matters except the issue presented by appellants. The Government motion therefore not only fails to show any ground for summary affirmance of the judgment below but the weakness of the case thus presented plainly discloses that this Court must reverse and remand the case to the Commission with directions to exercise its exclusive and plenary authority.

THE CARRIERS' MOTION CONFUSES THE ISSUE

The carriers' motion is a statement of false and irrelevant issues. Unlike the Government's motion and contrary to the fact, the carriers first assume that, respecting "matters of private right in the exercise of its responsibility under section 5(2) to see that the terms and conditions were 'just and reasonable', the Commission considered extensive evidence on that subject" (p. 3) and "considered appellants' contention in the light of the whole record" (p. 6). But beyond these unfounded assertions the carriers make no pretense that the Commission decided the merits of the controversy, nor had they done so at the oral argument in the court below (Tr. 52, 58, 77-85, 90). On the contrary even in their present motion they admit in stating the case that the issue was whether appellants are entitled to have their prior equity (par plus accumulations) recognized (p. 4).

Their first argument is that appellants insisted upon receiving "cash" rather than securities, whereas the oral argument cited above and the statement of jurisdiction (p. 5) make it plain that this was not the issue since appellants asked merely the satisfaction of their full priorities whether in cash or the equivalent securities. Yet the carriers' motion now insists that appellants seek "payment in cash" (pp. 4, 8, 9-10). The real purpose of this argument is apparently to bring into operation the so-called "appraisal statute" of the State of Virginia under which dissenters from a merger may seek appraisal of their shares and secure a cash payment (such statutes being common because securities of small corporations have no readily ascertainable market value so that exchanges in kind are impracticable). The purpose of the attempt to bring the case under the Virginia statute is because it may be that under Virginia law (as distinguished from Michigan law under which appellants' rights as shareholders arise) ac-

cruals of preferred dividends may be wiped out by the merger process (see the Statement of Jurisdiction, note 8). Appellees are so anxious to achieve this result that they have themselves instituted an appraisal action in the Virginia courts and are vigorously resisting removal proceedings. In their motion they ingenuously affirm that "there is no statutory provision in Michigan * * * for appraisal of dissenting stock in railroads" (p. 5), whereas the presence or absence of a special *statutory* remedy of appraisal in Michigan is immaterial since ordinary equity actions are there and elsewhere available to protect shareholders' interests. (See the public documents referred to in note 8 of the Statement of Jurisdiction as well as the Michigan statutes and cases referred to therein.) *The very existence of such opportunities for such misleading collateral judicial proceedings is one of the reasons why the exclusive and plenary jurisdiction of the Interstate Commerce Commission in such cases as these should not be dispersed.*

The second and equally irrelevant argument of the carriers is that appellants are demanding "some special and more favorable treatment for them because they were dissenting from the merger" (p. 4 and note 5) "by the mere fact of dissenting" (pp. 6-7, 8) and simply as a consequence of "their state of mind" (pp. 9-10). As set forth above with reference to the Government's motion, no such claim was ever made by appellants. The satisfaction of appellants' full priorities was admitted to be the real issue in the oral argument in the court below. And the latter admitted in its opinion that neither it nor the Commission purported to determine that issue and would not do so despite appellants' urging throughout these proceedings. The "state of mind" issue is not only a false one but it discloses—as has been patent throughout these proceedings—that appellees not only do not wish to meet the merits of this case but desire to obscure them from this Court.

The third and last argument of the carriers is equally evasive. First misstating the ruling in the *Otis* case (323 U. S. 624, 634), they argue on the basis of a Virginia decision under Virginia law despite the fact that appellants' rights arise and are being asserted under Michigan law. It is true of course that federal tribunals (here this Court, the court below, and the Interstate Commerce Commission) have jurisdiction, but shareholders (except those in federally created corporations) derive their status solely from the state law creating them so far as it does not conflict with any lawful federal requirements to the contrary. Here the Interstate Commerce Commission had to accept the shareholders as state law created them (Virginia, so far as Chesapeake & Ohio shareholders were concerned; Michigan, so far as Pere Marquette stockholders were concerned). It did so in determining which were common shareholders and which were preferred. It did so in determining the par value of their shares. It even did so in discussing the arrearages of Pere Marquette preferred.

The Commission inevitably gave effect to shareholders' status and rights under state law all along the line, except when it came to effectuating the accruals and prior equities of the Pere Marquette preferred. There, without explanation, it found itself powerless. It found itself not only powerless to correct the deficiency in the merger plan prepared by the jointly managed and controlled Marquette-Chesapeake-Ohio railroad but *it also found itself powerless either to reject or to condition that plan upon a due recognition of the rights of preferred shareholders in Pere Marquette.* It so concluded although the federal statute expressly gave it not only "exclusive" but "plenary" jurisdiction. It remitted appellants to some possible other tribunal in some other place. Whether—with respect to the shareholders' rights created by Michigan and under sections 5 and 20a of the federal Interstate Commerce Act—it was correct in finding itself thus impoverished is the issue

in this case. The statutes and decisions of Virginia have no more to do with it than those of Delaware or Poictesme.

CONCLUSION

In view of the manifestly groundless case presented by the Government's motion and the evasive arguments of the carriers, it is respectfully submitted that—if the judgment below cannot be reversed and remanded forthwith—the Court should note jurisdiction and determine the issue after receiving briefs and hearing argument.

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August 16, 1947.

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Supreme Court of the United States

OCTOBER TERM, 1947

ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, JR., JAMES M. SCHWABACHER, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

Appeal from the District Court of the United States for the Eastern District of Virginia

---

BRIEF FOR APPELLANTS

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Supreme Court of the United States

OCTOBER TERM, 1947

No. 258

ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, JR., JAMES M. SCHWABACHER, MAY K. SCHWABACHER, ETHEL S. SOKOLOW, and JOHN L. SCHWABACHER,
Appellants,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, ET AL.

Appeal from the District Court of the United States for the Eastern District of Virginia

---

BRIEF FOR APPELLANTS

Opinion Below

The opinion of the specially constituted three-judge district court (R. 254-255) is reported at 72 F. Supp. 560. Since the case is required by statute to be instituted in that court originally and comes here by direct appeal, there were no proceedings in any other court.

Jurisdiction

The final judgment, here for review on appeal, was entered on June 16, 1947 (R. 257), in the District Court of the United States for the Eastern District of Virginia by a statutory court consisting of one Circuit and two District Judges specially convoked under the provisions of 28 U. S. C. 47. Upon pleadings and argument a temporary stay was denied (R. 256, 251) and the cause was submitted for final decision (R. 195, 251-252). After entry of the final judgment of dismissal (R. 257) this appeal followed pursuant to the express provisions of 28 U. S. C. 47a and 345. The petition for appeal was filed July 22, 1947 (R. 257). Appellees filed motions to affirm, but this Court noted probable jurisdiction on October 13, 1947 (R. 267). The jurisdiction of the Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219-221, 28 U. S. C. 45, 47a, and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. 345).

Question Presented

The single question presented by this appeal is: In approving a plan for the merger of two railroads under a statute vesting it with "exclusive and plenary" authority, did the Interstate Commerce Commission unlawfully decline to take jurisdiction of an issue as to impairment of preferred shareholders' rights by the terms of merger so approved? The Commission thereby refused to recognize the rights of appellants, as holders of preferred stock in the railroad corporation dissolved by the merger, to equities arising under its corporate charter by virtue of accrued but unpaid dividends.

Statutes Involved

The portions of the Interstate Commerce Act (49 U. S.

C.), as amended, which are pertinent to the present controversy are as follows (emphasis supplied):

§ 5. *Combinations and consolidations of carriers.* • • •
(2) *Unifications, mergers, and acquisitions of control.*

(a) It shall be lawful with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership • • •

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission • • • shall afford reasonable opportunity for interested parties to be heard. • • • If the Commission finds that, subject to such *terms and conditions* and such modifications as it shall find to be *just and reasonable*, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the *terms and conditions, and with the modifications*, so found to be *just and reasonable.* • • •

(11) *Plenary nature of authority under section.*

The authority conferred by this section shall be *exclusive and plenary*, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have *full power* (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such

purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the anti-trust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State. (Sept. 18, 1940, ch. 722, title I, § 7, 54 Stat. 985.)

* * * * *

§ 20a *Securities of carriers: issuance, etc.*

(2) *Issuance of securities; assumption of obligations; authorization.*

* * * It shall be unlawful for any carrier * * * to assume any obligation or liability * * * in respect of the securities of any other person, natural or artificial * * * unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission * * * of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. * * *

(3) *Scope of Commission's authority.*

The Commission * * * may from time to time, for good cause shown, make such *supplemental orders* in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied * * *

(7) *Jurisdiction of Commission as exclusive and plenary.*

The jurisdiction conferred upon the Commission by this section shall be *exclusive and plenary*, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein. * * *

(11) *Securities issued contrary to law void; effect; penalty.*

Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters *preceding* the entry of such order of authorization. (Feb. 4, 1887, ch. 104, part I, § 20a as added Feb. 28, 1920, ch. 91, § 439, 41 Stat. 494, and amended Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.)

Statement

This appeal is prosecuted from a final judgment (R. 257) which dismissed appellants' complaint (R. 1 *et seq.*) seeking to enjoin an order of the Interstate Commerce Commission which approved an application for the merger of the Chesapeake and Ohio Railway Company and the Pere Marquette Company under the terms of the Interstate Commerce Act as amended. See 49 U. S. C. 5 (2) and (11) and 20a (2), (3), (7), and(11). The ground for relief was that the Commission had failed to perform its statutory duty in approving the proposed merger agreement in that it expressly declined to determine or recognize the rights of dissenting preferred shareholders or to protect their equities arising from accruals of unpaid dividends (R. 52-56). The Chesapeake and Ohio Railway Company, Pere Marquette Railway Company, and Alleghany Corporation as well as certain shareholders were permitted to intervene in support of the Commission's order (R. 181-186, 190-191, 192). The three-judge court sustained the Commission (R. 254-255) and this appeal followed.

On March 8, 1946, the Chesapeake and Ohio Railway Company and the Pere Marquette Railway Company, together with Alleghany Corporation, applied to the Interstate Commerce Commission for authorization to consummate an agreement of merger between the two railway companies (R. 7-9). Their application was filed pursuant to the provisions of Section 5 of the Interstate Commerce Act, as amended, relating to voluntary consolidations, mergers or acquisitions of control of rail carriers and Section 20a of said Act relating to restrictions on the issuance of securities and the assumption of liabilities (49 U. S. C. 5 and 20a). Prior to the filing of the application a majority of the shareholders of each corporation had approved the merger agreement proposed by the management of the companies (R. 17) as required by 49 U. S. C. 5 (11).

Appellants as well as other shareholders filed notices of dissent (R. 2, 3, 49 *et seq.*).

Evidence was taken for the Commission and a proposed report was issued (R. 9, 7). Appellants intervened in the administrative proceedings (R. 2, 7). Exceptions were filed, after which Division 4 of the Commission heard oral argument (R. 7). By its report in Finance Docket 15228 dated April 1, 1947, Division 4 approved the merger as proposed by the railroads (R. 5 *et seq.*) and issued an order on behalf of the Commission to that effect (R. 64-67). Petitions for rehearing were denied by the full Commission (R. 3, 67-68).

In the administrative proceedings appellants had contended that the ratio of stock exchange proposed in the agreement of merger (R. 101 *et seq.*) was not just and reasonable as 49 U. S. C. 5 (2) (b) required. They grounded this contention on the fact that the proposed ratio of exchange violated their contractual and statutory rights as the holders of preferred stock in Pere Marquette under the laws of the State of Michigan where Pere Marquette was incorporated (R. 12) until its existence was terminated by the merger here involved (R. 20, 103). Their stock, which had been issued to and held by them pursuant to the laws of Michigan, was admittedly $100 par value 5 per cent *cumulative* preferred (R. 18). Dividends had been in arrears since 1931, in the sum of at least $72.50 (R. 49; but now more). Their equity under Michigan law was therefore at least $172.50 whereas the merger proposal offered them at most $100 in securities of Chesapeake and Ohio.[1]

[1] The merger agreement provided for an exchange of 4/10 of a share of Chesapeake and Ohio common plus 8/10 of a share of the new Chesapeake and Ohio preferred for each share of Pere Marquette preferred (R. 32). Prior to the merger Chesapeake and Ohio had no outstanding preferred (R. 18). It undertook to issue redeemable preferred, in conversion of the shares of Pere Marquette, with a liquidation price of $100 (R. 23, 27-29). Since Chesapeake and Ohio common was then selling at just under $50, appellants took the value of the securities offered in

On the basis of those figures appellants rightly contended that, if the merger were approved, their equities would be cut down in the exchange by something more than $70 per share. Admittedly Chesapeake and Ohio calculated the ratio for exchange of securities at the then stock market price (R. 39-43) without consideration of the accrued equities or legal priority of the holders of preferred stock (see note 1 *supra*). Appellants claimed the right to their full prior equities in either cash or equivalents. *Geddes* v. *Anaconda Mining Co.*, 254 U. S. 590, 598; *Clearwater* v. *Meredith*, 1 Wall. 25, 39-41. They based that right upon both the corporate charter of Pere Marquette [2]

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exchange to be no more than $100 (4/10 of $50 plus 8/10 of $100). On an optimistic view of greater market value for Chesapeake and Ohio on a rising market, the Commission's report states a possible value in exchange of $111.60 (R. 42). As presently quoted, the actual exchange value under the terms of the merger is now under $90. As to the relevance here of the latter figure, this Court has held that even "predictive" findings may be checked by reference to actual figures thereafter available. *Market Street R. Co.* v. *Commission*, 324 U. S. 548, 561-562.

Since the Commission did not deem itself authorized to consider the issue here presented, it made no findings on the point. As a consequence it is difficult to spell out the relevant facts from a report related to other issues. Presumably this Court will not undertake the burden of doing so. *United States* v. *Chicago etc. R. Co.*, 294 U. S. 499, 505, 511; *Atchison Ry.* v. *United States*, 295 U. S. 193, 201-202; *United States* v. *Pyne*, 313 U. S. 127, 130-131; *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489; *Howard Hall Co.* v. *United States*, 315 U. S. 495, 501; *Yonkers* v. *United States*, 320 U. S. 685, 687-688, 689, 691-692; *Eastern-Central Assn.* v. *United States*, 321 U. S. 194, 209-210; *Colorado-Wyoming Co.* v. *Commission*, 324 U. S. 626, 634.

[2] The charter provision respecting Pere Marquette preferred provides for full payment of par plus accrued unpaid dividends (here amounting to at least $172.50 instead of the $100 offered) "in the event of dissolution, liquidation, or winding up of the company, voluntary or involuntary * * * before any amounts are paid to holders of the * * * common stock" (R. 50). Where "stockholders receive their distribution in kind" (that is, in stock) it has been held to be "in fact and law a liquidation of assets" and a "winding up." *Constitutional Co.* v. *United States*, 259 U. S. 156, 177. Likewise, where one Michigan corporation "sells" its assets to a successor, it is a "winding up." *Mason* v. *Pewabic Mining Co.*, 133 U. S. 50, 58, 64. Here the merger agreement itself expressly provides that the corporate existence of the Pere Marquette "will cease" on consummation of the merger (R. 20, 103); and the Michigan statute expressly provides for only one corporation "to survive in the case of a merger" (Michigan Statutes Annotated § 22.233). Consequently, on this ground appellants properly insisted throughout the proceedings that the merger agreement should not be approved unless and until provision had been made for the recognition of their full equity accumulation and legal priority for each share of preferred stock they hold.

and the Michigan merger statute.[3] Therein they raised a familiar issue in federal law, whether administrative or judicial.[4]

Both sections 5 and 20a of the Interstate Commerce Act vest the Commission with "exclusive and plenary" jurisdiction with respect to the merger. Nevertheless on April 1, 1947, the final order of the Commission was promulgated upon the assumption that (R. 54-55, emphasis supplied):

> This does not mean that the Chesapeake & Ohio and the Pere Marquette do not remain free to settle controversies with dissenting stockholders through negotiation and litigation in the courts. * * *
>
> *Whether dissenting stockholders, as members of a class created by the merger, are entitled to better treatment under their charter contract with the Pere Marquette is a question not within our province to decide* * * * Objecting stockholders have the right to

[3] It is expressly recognized that the merger is to be accomplished "under the enabling statutes" of Michigan (R. 16). The pertinent statute of the latter state permitting Pere Marquette to be dissolved and its property merged with the Chesapeake and Ohio provides, as an express condition, that "the debts, liabilities and duties of either company shall thenceforth attach to such new corporation, and be enforced against the same, to the same extent, and in the same manner, as if such debts, liabilities and duties had been originally incurred by it" (Michigan Statutes Annotated, § 22.234). The merger agreement evades this language (R. 20, 103-104). Language similar to that of the Michigan statute quoted in the text was before the Court, and given effect, respecting other forms of liability after a consolidation in *New York, C. & St. L. R. Co.* v. *Frank*, 314 U. S. 360, 361-362; and see both the concurring statement of Mr. Justice Douglas (p. 373) and the Commissioner's own prior decisions reviewed by Mr. Chief Justice Stone (pp. 384-385). Similar language has been construed by the Supreme Court of Michigan (in another of its corporation statutes) in *Sutton* v. *Globe Knitting Works*, 276 Mich. 200, 276 N. W. 815 (1936), where a corporation attempted to eliminate by majority vote redemption rights of preferred stock; and it was held that the state legislature had not and could not authorize such a deprivation of such vested contractual rights (pp. 209-210). By the same token rights to accruals of unpaid dividends, as here involved, may not be divested by vote of the shareholders.

[4] The justiciable nature and the relevance of the issue are the subject of note 5 and point 4 of the argument *infra*. The public importance of the problem is evidenced in an extended study issued by the Securities and Exchange Commission in 1938 pursuant to Section 211 of the Securities Exchange Act of 1934. *Management Plans without Aid of Committees*, being Part VII of the *Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees* (Government Printing Office, Washington).

> present their case before two tribunals, both charged with the duty of protecting their interests * * * Possibly the courts may be called upon to determine controversies between dissenting stockholders and their companies. Because of the expense that might be involved, it is necessary that we consider that possibility.

It then concluded that, assuming maximum liability to dissenters to be less than $11,000,000, the sale of stock issuable to them under the merger "together with net current assets to be taken over in the merger, not only should fully reimburse Chesapeake and Ohio, but should exceed substantially, any probable expenditure of cash that it might be required to make in connection with the merger" (R. 55-56).

In refusing injunctive relief the court below held that the Commission's ultimate conclusion of justness and reasonableness of the merger was "based on substantial evidence" (R. 255) despite the fact that the proceeding was upon motion to dismiss on the pleadings and hence the evidence upon which the Commission had relied was not before the court. Compare *United States* v. *Lowden*, 308 U. S. 225, 231. The court also remarked in its opinion that appellants sought "preferential treatment" from the Commission and the court "quite apart from any merit in the grounds of dissent" (R. 255). But no such contention was noted by the Commission (R. 52-56). No such proposition was pleaded in the complaint (R. 2-3 and Exhibit A thereto at R. 52-56). And at the argument all the parties conceded that the issue was whether, or in what forum, the prior equities of the dissenting stockholders of Pere Marquette should be recognized (appellants R. 198-205, 246-251; United States R. 212; Interstate Commerce Commission R. 216; the carriers R. 224, 227, 238-243; and other shareholders R. 246).

Specification of Errors

The court below erred (R. 259-260, 266):

1. In dismissing the complaint and failing to enjoin the order of the Interstate Commerce Commission.

2. In holding that appellants' rights were protected by said order, in failing to set it aside and require the Commission to take appropriate steps to protect the rights of appellants, and in holding that the Commission had properly found the treatment of shareholders and the assumptions of liability under the merger plan were just, reasonable, and in accord with its statutory duty.

3. In holding that the Commission's jurisdiction was not plenary and exclusive, that any remedy appellants might have lay with other courts in other forms of proceeding, and that appellants as dissenting preferred shareholders were seeking "preferential" treatment "quite apart from any merit in the grounds of dissent".

Summary of Argument

1. The Commission and the court below have ignored the plain words of the statute as well as its history. The statute provides that the jurisdiction of the Commission shall be not only "exclusive" but "plenary" in merger cases respecting merger plans. These words are to be construed as saying what they obviously mean. Since the language of the statute is plain there is no need for recourse to the history of the legislation, but in any event that history confirms that the jurisdiction conferred upon the Commission was designed to cover the very type of merger issue here involved.

2. The Commission's present position is inconsistent, irrational, and irreconcilable. It asserts that appellants have the right to present their case to "two tribunals" (apparently meaning itself and a reviewing court), but it also disclaims "province" to treat with the issue here pre-

sented. It finds that resort to state laws would "frustrate" national transportation policy, but it invites appellants to settle their controversy in the courts. It meticulously reviews the proposed securities to be issued to assenters, and it even discusses fully rights of dissenters in respects other than here involved; but it avoids the cumulated prior equities of the holders of Pere Marquette preferred. It holds it necessary to determine "that all stockholders of the same class are to be treated alike", but regards itself impotent to correct a wrong done to all alike. It approves assumption of liabilities to dissenting shareholders without determining the full possibilities in that regard. Thus it fails to perform its statutory duty under § 20a as well as § 5.

3. The Commission and the court below have departed from administrative practice and have acted contrary to the course of judicial decision. Heretofore the Commission has expressed grave concern for the protection of minorities in mergers. Upon that background Congress has amended and reenacted the statute. This Court has also held that "exclusive and plenary" means nothing less than primary and complete. *Thompson* v. *Texas Mexican Ry. Co.*, 328 U. S. 134, 146-150; *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 77-79.

4. The Commission and the court below have failed to recognize and determine a common type of justiciable issue in corporate reorganizations. This Court has said on many occasions that the priorities of various classes of shareholders under a corporate charter must be recognized by courts and agencies which deal with the earnings or assets of their companies. *Otis & Co.* v. *Securities & Exchange Commission*, 323 U. S. 624, 634, and authorities there cited. That rule has also been consistently applied by the Court in reviewing actions by the Interstate Commerce Commission in railroad reorganizations. There is a further reason for meticulous application of the require-

ments in this case because, since Chesapeake and Ohio has long controlled and managed Pere Marquette, the merger plan is not an arms-length arrangement. Finally it is to be noted that the necessity for protecting the cumulative equities of preferred shareholders has been stressed in recent years by those appointed in law for the purpose of exercising regulatory functions over securities issues and other corporate reorganizations.

ARGUMENT

There is no warrant in law for the action of the Commission or the judgment of the court below. Both are contrary to the statute, inconsistent in the attempted statements of justification, contrary to the course of administrative practice as well as of judicial decision, and ignore a long recognized justiciable issue of public importance.

1. The Commission and the court below have ignored the plain words of the statute as well as its history.— The statute provides that the jurisdiction of the Commission is not only "exclusive" but "plenary" both with respect to the approval of mergers (49 U. S. C. 5) and the assumption of liabilities with respect thereto (*id.* § 20a). The basic issue here, therefore, is whether the Commission correctly found it not within its "province to decide" whether appellants' rights as holders of preferred stock in Pere Marquette would be wrongfully impaired in the execution of the proposed merger agreement. These equities were not considered in either the merger agreement or the Commission's report save as the latter held their recognition to be outside its "province" (R. 52-54). The Commission should have either rejected the merger application for failure to satisfy, or have conditioned its approval upon appropriate satisfaction of, appellants' rights as holders of preferred stock with accrued and vested dividend rights in Pere Marquette. Section 5 (2) (b) of the

statute not only expressly authorizes the Commission to impose terms and conditions but section 20a (3) authorizes the Commission to issue supplemental orders at any time "for good cause."

The question here is basically statutory.[5] Congress need not have specified that it conferred "exclusive" jurisdiction, for that would have followed to the extent that

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[5] Of course, if the statute were to be held to permit the Commission to wipe out shareholders' rights notwithstanding there were adequate funds to satisfy them and the merger was wholly voluntary, constitutional issues would arise and the saving clause of 49 U. S. C. 5 (12) would be brought into operation. The "contractual" rights here involved were beyond the authority of a majority of Pere Marquette to change. *Voight* v. *Remick*, 280 Mich. 189, 204, 205, 244 N. W. 446, cert. denied 289 U. S. 756. Such rights of preferred shareholders are vested and binding upon all tribunals. *Treigle* v. *Acme Homestead Assn.*, 297 U. S. 189, 196, 198; *Hopkins Savings Assn.* v. *Cleary*, 296 U. S. 315, 336, 340-341; *Bedford* v. *Eastern Building and Loan Assn.*, 181 U. S. 227, 240.

In the debates which led to the Transportation Act of 1920, where authority was conferred on the Commission respecting mergers and the issuance of securities, it was recognized that charter rights would not and could not be modified. Thus in the *Hearings* before the Senate Committee on Interstate Commerce, 65th Congress (3d Sess.), January 3 to February 21, 1919, on *Extension of Time for Relinquishment by the Government of Railroads to Corporate Ownership and Control*, v. 1, Senator Underwood was concerned about the exercise of federal powers "to destroy a state institution" (p. 245). Senator Kellogg stated that "the Federal Government could not amend the charter so as to change the form of the stock or anything of that kind" (*id.*). Commissioner Clark stated in response that control over securities issues "would be in no sense a destruction of the creation of the State" (p. 246). But Senator Underwood returned to his "question of prescribing the terms on which a State charter shall operate, or fixing the terms of the operation of a charter secured from one sovereign by another sovereign" (*id.*).

At the House hearings on H. R. 4378, 66th Congress, July-October 1919, there was a demand for compulsory federal incorporation (pp. 1253, 1305-1308) in which the shareholders would have the "same relative interest in the same property", which "would no more change * * * the rights of stockholders * * * than does an act of the legislature that changes the name * * * of a corporation created by it", and in which "all * * * private rights and relations should continue as before". The Senate proposal was for compulsory consolidation of carriers, with an express reservation that contractual rights "shall continue unimpaired" (59 Cong. Rec. 140-141). In the debate on the Senate proposal Senator Cummins stated that "there can not be any disturbance of contractual rights" and that, on purchase or condemnation of a carrier, it would be "the duty of that corporation then to distribute the value of that property * * * in accordance with the rights of * * * shareholders" (*id.* 591-592). The existence of vested contract rights "between the state and the corporation" were recognized (*id.* 226). The House of Representatives declined to go along with the compulsory consolidation proposal. The authority of the Commission was therefore limited to the review of voluntary plans of consolidation.

authority was actually conferred upon the Commission.[6] Even the precise terms indicating the extent of authority conferred need not be examined because here, unlike other statutes, it is expressly provided not only that the authority is "exclusive" but that it is "plenary." The latter means "full; entire; complete; absolute" according to common dictionaries. "There is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen* v. *Ward*, 279 U. S. 337, 339. That these words are abbreviated "does not conceal the purpose". *St. Louis-San Francisco Ry.* v. *Middlekamp*, 256 U. S. 226, 232. "The law uses familiar legal expressions in their familiar legal sense." *Henry* v. *United States*, 251 U. S. 393, 395. It is difficult to conceive, therefore, how this broad, unequivocal, and express language leaves anything to any other forum than the Interstate Commerce Commission as the tribunal of primary resort. Neither the Commission nor the court below has done more than assume the contrary.

Here the "entire history of the legislation" may properly be cited in opposition to the present views of the Commission and the court below. Compare *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, 364 *et seq.* Here "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349; and see to the

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[6] *Rice* v. *Chicago Board of Trade*, 331 U. S. 247; *Bethlehem Co.* v. *State Board*, 330 U. S. 767; *Mayo* v. *United States*, 319 U. S. 441; *Penn Dairies* v. *Milk Control Commn.*, 318 U. S. 261; *Parker* v. *Brown*, 317 U. S. 341; *Cloverleaf* v. *Patterson*, 315 U. S. 148. In *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 224, 229, 233-234, the statute provided "exclusive" jurisdiction in the federal agency.

Exclusion of jurisdiction in other tribunals "may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting." *Bethlehem Co.* v. *State Board*, 330 U. S. 767, 772. Although many functions of the Interstate Commerce Commission are provided by statute without specification that they shall be "exclusively" performed by the Commission, this Court has said that "an action before the Interstate Commerce Commission is akin to an inclusive equity suit in which all relevant claims are adjusted." *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 142. See also *Transit Commission* v. *United States*, 289 U. S. 121, 129, in which authority over acquisition of trackage rights is held "paramount and * * * necessarily exclusive."

same effect *United States* v. *Whitridge*, 197 U. S. 135, 143. But the language involved is plain, unequivocal, and comprehensive. Consequently there is here no need for resort to the course of legislation or the legislative history for purposes of construction. "The Act speaks for itself with sufficient clarity." *Electric Bond Co.* v. *Comm'n*, 303 U. S. 419, 438. "We are not at liberty to construe language so plain as to need no construction." *Helvering* v. *City Bank Co.*, 296 U. S. 85, 89. "Congressional purpose as manifested by text and context is not rendered doubtful by legislative history." *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 615.

However, nothing in the legislative history detracts in the slightest from the plain sweep of the statutory language. In the issuance of securities, there was demand that the Commission "be the dominant regulatory body" with "exclusive jurisdiction over the issuance of securities" (Senate Hearings, *op. cit.* n. 5 *supra*, p. 727). At the House hearings Commissioner Clark asked that the Commission be given exclusive jurisdiction (on H. R. 4378, 66th Congress, July-October 1919, pp. 34-35, 123) as did others (pp. 1081-1083) but there was a contrary demand for a saving clause respecting state authority (pp. 1631-1633). Congressman Steagall was unsuccessful in attempting to secure an amendment to the latter effect (58 Cong. Rec. 8673 and see also p. 8685). House Report No. 456 of the 66th Congress on H. R. 10453 (November 10, 1919), which became the Transportation Act of 1920, summarized all bills and pointed out that all provided for full control by the Commission over security issues (p. 3 and see chart facing p. 46). Exclusive jurisdiction was proposed for the Commission (*id.* 5). The legislative views as to the approval of voluntary mergers, and the full protection of shareholders therein, were involved with the alternative proposal for compulsory consolidation favored by the Senate as set forth in note 5 *supra*. When the Transportation

Act of 1940 was adopted, the revisions of the merger provisions were designed further to amplify the authority of the Commission (86 Cong. Rec. 10166-10167).

The phrase "exclusive and plenary" has been in 49 U. S. C. 20a since its adoption by the Transportation Act of 1920 (41 Stat. 456, 495). The Transportation Act of 1940 added it to 49 U. S. C. 5 as well (54 Stat. 898, 908). Preceding the 1920 Act, the Commission had long sought authority over security issues. At the hearings before the Senate Committee on Interstate Commerce (*Extension of Time for Relinquishment by the Government of Railroads to Corporate Ownership and Control*, January 3 to February 21, 1919, 65th Congress, 3d Session, v. 1) it successfully began its final drive to secure 49 U. S. C. 20a. It introduced in those hearings excerpts from its annual reports from 1908 through 1918 (pp. 339-344). It called the attention of Congress to its previous pronouncements:

> It is of the utmost importance * * * that railway securities should be safe and conservative investments for the public. (*Consolidation and Combinations of Carriers*, 12 I. C. C. 277, 306.)
>
> It will help if minority stockholders are more watchful of their interests. (*Pere Marquette R. Co. and C. H. & D. Ry. Co.*, 44 I. C. C. 1, 223.)
>
> Stock becomes widely distributed among investors who pay little or no attention to guarding their investments. But this situation, fraught with grave danger to the investing public, is one with which Congress must deal. As the law now is, this commission is powerless * * * to protect * * * stockholders from depredations and losses * * * Private capital invested in carrier companies cannot be generally safe under such lack of security regulation as has existed * * * (*Proposed Increases in New England*, 49 I. C. C. 421, 434.)

Congress then granted the requested authority in 49 U. S. C. 20a, which manifestly has not withered in the intervening

quarter century. The words "exclusive and plenary" came into the statutes "freighted with the meaning imparted to them by the mischief to be remedied and by contemporaneous discussion." *Duparquet Co.* v. *Evans*, 297 U. S. 216, 221.

2. The Commission's present position is inconsistent, irrational, and irreconcilable.—The Commission's report not only disclaims "province" to determine the question here involved but in the same paragraph inconsistently states that "objecting stockholders have the right to present their case before two tribunals, both charged with the duty of protecting their interests" (R. 54). If the latter is true, the former is untrue. If appellants have a "right to present their case before *two* tribunals" (that is, apparently, the Commission and a reviewing court), then confessedly the Commission has denied them this right by holding any question respecting it to be beyond the Commission's province to decide. The same inconsistency appears in the Commission's statement that "Congress has always had regard for private property involved by requiring us to consider the terms and conditions of unification proposals" (R. 53).

Again the Commission holds it "difficult to conceive of a restraint or limitation on contemplated unifications better serving to frustrate the national transportation policy than the provisions of State laws for compensation of dissenting stockholders on specified bases" (R. 53). But on the next page of its report it invites appellants "to settle controversies * * * through * * * litigation in the courts" (R. 54). These positions are patently inconsistent.

The court below has, moreover, compounded the inconsistencies in the Commission's report. It noted that the Commission had not passed upon the rights of dissenters under state law but had left them "free to settle controversies with dissenting stockholders through negotiation

and litigation in the courts" (R. 54, 255). Asserting that it would "adopt a like course", the court below held that "nothing in our opinion is to be interpreted as in any way determining, affecting or prejudicing these rights" (R. 255). Yet the court only superficially followed the Commission. The latter had declined jurisdiction in favor of "the courts" (R. 54) including apparently the court below as that court itself understood at the argument (R. 204-205). But the court below in turn declined the jurisdiction in favor of unspecified other courts, presumably in some other form of proceeding "under the laws of the several states" (R. 255). The situation here, then, is one in which the Commission (despite inconsistent language to the contrary) has declined jurisdiction in favor of the reviewing court, and the latter has in turn declined it in favor of some other court in some other form of proceeding. Of course, however, the court below was correct in that, if the Commission did not have jurisdiction, then a reviewing court could have no broader jurisdiction (see R. 204-205). Indeed, the latter has more limited powers because, having laid bare some error of law in administrative action, judicial authority is exhausted. *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134, 141; 145. Here, therefore, the fundamental error was that of the Commission and the error of the court below lay in not saying so.

Another and even more curious anomaly lies in what the Commission did rather than what it said. It felt obliged to review meticulously the merger treatment of the security rights of those *who assented and agreed to the merger plan*. Thus it analyzed at great length the securities that Chesapeake and Ohio proposed to issue (R. 35; preferred R. 20-29; common R. 29-30), the ratios of exchange proposed (R. 31-35), the then going-market-price basis therefor (R. 39-41-43), and the fairness of the plan so far as holders of Chesapeake and Ohio stock were concerned (R. 48-49). It even reviewed, *in respects other than those*

material here, the fairness of the exchange so far as Pere Marquette shareholders were concerned (R. 39-41, 49-52). But, although it had carefully analyzed *all other shareholders' rights* and even took account of the par value of Pere Marquette preferred, *it did not discuss, and found itself without jurisdiction to deal with, the cumulative prior equities of Pere Marquette preferred* (R. 52-55). In that respect, and although it otherwise recognized a duty even "if not a single share be in dissent" (R. 40), it failed to discuss or deal with the full rights of Pere Marquette preferred *whether held by either assenters or dissenters.* The Commission's painstaking review of all other shareholders' rights, in contrast to its studious avoidance of those of both assenters and dissenters in the respect here involved, is supportable in neither reason nor law.

In point of fact the attempt of the dissenters to preserve their rights by dissenting apparently caused the Commission to regard them merely as "members of a class" set apart (R. 54). The Commission there said:

> Our duty in respect to stockholders is complete, in our opinion, when we make certain that all stockholders of the same class are to be treated alike.

Thereby the Commission assumed itself empowered to take corrective action only in the unlikely event that a merger plan capriciously differentiated between holders of the same security. It ignored the fact that, even within a class of security holders, some might waive their rights while others such as appellants were fully entitled to insist upon them. The Commission thus reasoned itself into irrational impotence. It had dealt with the cumulative prior equities of the Pere Marquette preferred stock of neither assenters, abstainers, nor dissenters. It set the dissenters apart but, despite doing so, held itself unable to effectuate their rights because it deemed itself empowered only to "make certain that all stockholders of the same class are to be treated alike" (R. 54). In short,

because the merger plan did not recognize the accrued arrearages due any of the Pere Marquette preferred shareholders, the Commission concluded that it could not act for the benefit of those who had preserved their rights. This very novel assumption is tantamount to saying that, if *all* are wronged, by the same token *none* may recover. Manifestly no public agency and no court of justice should assume, at least in the absence of the strongest proof, that Congress intended any such inexplicable result when it conferred exclusive and plenary authority upon the Commission to determine the justness and reasonableness of merger plans. 49 U. S. C. 5.

The court below, also, seems to have thought that dissenters may not seek to vindicate statutory rights if by such relief they may secure "more favorable treatment than the treatment accorded to stockholders of the same class (holding the same securities) who did *not* dissent but *agreed* to the conditions in the merger agreement" (R. 255, emphasis supplied). But such a rule would simply and manifestly wipe out all rights to dissent from corporate mergers, as the court itself indicated in strong language at the argument (R. 203-204). It found "no support in practical *economics* or in commercial *ethics*" for appellants' attempt to have their property rights recognized (R. 255, emphasis supplied) despite the fact that the issue was not legislative but a justiciable one arising upon the statutes of Michigan and the United States.

Much the same difficulties are shown in the Commission's treatment of its duty under 49 U. S. C. 20a, where it approved in advance and in an indeterminate amount the possible liability of the carriers in the event of successful independent stockholders' suits (R. 55-56). The figures there given, and the means assumed to be sufficient to satisfy such liability, are based upon no real examination into shareholders' rights and remedies. They are limited to such figures as happen to appear in the record documents respecting dissenters (R. 55) and the even smaller

number of shareholders who had requested the special statutory remedy of appraisal under Virginia statutes (R. 56 note 14). But the limitation of potential liability to those who have sought such appraisal, or even to those who have dissented, is based on an unwarranted assumption. The suggested limitation of liability to those dissenters who have sought appraisal under *Virginia* statutes is completely irrelevant so far as the shareholders of Pere Marquette are concerned because the latter hold rights under *Michigan* law.[7] And if for example the remaining vast majority of shareholders can show rights of recovery because of representations made in the proxy statements, the fact that they failed to dissent from the merger may be immaterial.[8] In short, the Commission's

[7] The cases cited in notes 2 and 3 *supra* illustrate the forms of action applicable apart from special statutory remedies of "appraisal". "Resort to litigation is always a possibility, but such litigation is likely to be expensive and protracted; and its ultimate success will necessarily be a matter of speculation, with the odds weighted heavily in favor of the management." *Op. cit. supra* note 4, p. 112. The same official source sets forth at length the practical inadequacy of the individual stockholder's remedy in a court of equity (pp. 118-119, 336-337, 543-555) as well as the legal insufficiency of statutory appraisal as generally administered (pp. 196, 542, 590-610, and see particularly the conclusions at p. 610). Nevertheless two forms of remedy exist.

The immateriality of Virginia statutes here is plain. As in the case of federal taxation, most rights and liabilities basically arise under local law rather than federal. "Our problem only touches transactions for which rights and obligations are created by one of the States." *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 101. See also *Huddleston* v. *Dwyer*, 322 U. S. 232, 236-237. "The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state." *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 155. Michigan, as the state which created Pere Marquette, determines the nature of property rights of Marquette shareholders. *Jellenik* v. *Huron Copper Mining Co.*, 177 U. S. 1, 12-13; *Hammond* v. *Hastings*, 134 U. S. 401, 404.

[8] Under the heading "Statutory Rights of Dissatisfied Stockholders" the Proxy Statement reads (R. 99): "The statutes of Michigan contain no provision dealing with this subject." For the relevance of the omission to mention the availability of ordinary equitable remedies see notes 2, 3, and 7 *supra*. In this connection two official publications of the Government of the United States deal with the similar problems arising in an earlier phase of the creation of the augmented railroad system here involved. In 1938 the Securities and Exchange Commission issued its report on Reorganization Committees. *Op. cit. supra* note 4. Therein it treats of "plans designed to eliminate arrearages of accumulated dividends on preferred stock" (pp. 109-197), the "elimination of minorities by dissolution, merger or consolidation of other companies" (pp. 294-

action on this phase of the case is based upon no real inquiry into the law, the facts, or the reach of possible liability. It has therefore failed to perform its statutory duty under section 20a of the Interstate Commerce Act. Compare *New York, C. & St. L. R. Co.* v. *Frank*, 314 U. S. 360, 372.

3. The Commission and the court below have departed from administrative practice and have acted contrary to the course of judicial decision.—In the past the Commission has not, as in this case, limited its jurisdiction to exclude issues as to minority or dissenting shareholders. In *Unification of Southwestern Lines*, 124 I. C. C. 401, 434, it said:

> We are not impressed by these reasons for the failure to prepare and announce a plan for the protection of minority stock interests. Before we can approve an acquisition of control under paragraph (2) of section 5 we must find that the terms and conditions on which it is to be effected are 'just and reasonable in the premises.' They are not just and reasonable unless they include proper provisions for the protection of minority interests and we can not say that the provisions to be made for such protection are proper until we know what they are, nor prescribe proper provisions in the absence of adequate evidence which will enable us to determine what they ought to be.

See also *Nickel Plate Unification*, 105 I. C. C. 425, 447-448; *New York Central Unification*, 150 I. C. C. 278, 320; *Denver & St. L. Ry. Co. Control*, 252 I. C. C. 153, 195. See *Cleve-*

335), and the "inadequacy of protection afforded minorities by appraisal statutes" (pp. 342-352). It reviews at length the basic rights of shareholders, under state law, on the merits of the controversy here involved. It reviews extensively the "plan of consolidation for the Alleghany Corporation and The Chesapeake Corporation" including the judicial correction (under Maryland law) of the attempt to wipe out accruals on preferred stock and "non-disclosure in soliciting material" (pp. 353-411). See on the same subject Part 10 of the *Investigation of Railroads, Holding Companies, and Affiliated Companies*, Senate Hearings pursuant to S. Res. 71, 75th Congress (1937).

land, C. C. & St. L. Ry. Co. v. *Jackson*, 22 F. 2d 509, 511 (CCA 6) for a judicial confirmation of this view. See also *United States v. Lowden*, 308 U. S. 225, note 1 at 233.

Congress has both amended and reenacted the statute here involved, without any other understanding. See the history of 49 U. S. C. 5 and 20a, particularly the comprehensive revision of the Interstate Commerce Act by the Transportation Act of 1940 (54 Stat. 898). In the passage of the latter Congress was expressly aware of the importance and course of administrative interpretation (86 Cong. Rec. 11766) and made changes only for other purposes (*id.* 11768). In these circumstances the Court should be extremely reluctant to find now either a different intention on the part of Congress or a lack of authority in the Commission. See *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116; *Fondren* v. *Commissioner*, 324 U. S. 18, 29-30; *Merchants Bank* v. *Commissioner*, 320 U. S. 256, 260; *Brooks* v. *Dewar*, 313 U. S. 354, 361; *United States* v. *Safety Car Heating Co.*, 297 U. S. 88, 95; *Morrissey* v. *Commissioner*, 296 U. S. 344, 355; *Hartley* v. *Commissioner*, 295 U. S. 216, 220; *Helvering* v. *Bliss*, 293 U. S. 144, 151.

The statute is plain, Congress has steadily amplified the Commission's powers, and the administrative agency itself has heretofore not found itself impoverished of authority in the respects here material. Consequently the federal courts have not heretofore been called upon to determine the precise question here involved. But this Court has plainly indicated that "exclusive and plenary" means nothing less than primary and complete. In *Thompson v. Texas Mexican Ry. Co.*, 328 U. S. 134, 146-150, the Court held that under section 5 (2) (a) of the statute here involved the Commission and "not the courts" had exclusive authority to determine the terms and conditions under which trackage rights may be acquired notwithstanding that they "are consensual arrangements between the parties." In *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 77-79,

the Federal anti-trust authorities were required to present antitrust questions to the Commission in a merger proceeding. If those cases were correctly decided as they undoubtedly were, this Court there necessarily assumed an even broader jurisdiction in the Commission than necessary here to permit it to deal with the issue respecting appellants' rights as shareholders. There are of course subjects which are irrelevant in these merger cases.[9] But here the rights which appellants seek to have recognized by the Commission lie well within its plenary and exclusive jurisdiction over merger terms as such.

4. The Commission and the court below have failed to recognize and determine a common type of justiciable issue in corporate reorganization cases.—If the issue here presented is one within the "exclusive and plenary" jurisdiction of the Commission as the statute and the foregoing authorities indicate, then manifestly and admittedly the Commission has unlawfully failed to accord plaintiffs their rights as holders of cumulative preferred stock in Pere Marquette. It has been said by the Court on many occa-

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[9] Attempts have been made to bring within the jurisdiction of the Commission matters completely beyond merger issues. (1) Where the issue raised is a claim of *ultra vires* under state law which is "remote" in the sense that only the state may raise it. *N. Y. Central Securities Co.* v. *United States*, 287 U. S. 12, 26; *Cleveland etc. Ry.* v. *United States*, 275 U. S. 404, 413-414; relying on *Kerfoot* v. *Farmers' & Merchants' Bank*, 218 U. S. 281. (2) Where the shareholder's cause of action is not directly related to the merger transaction. *N. Y. Central Securities Co. v. United States*, *supra*, 28-29, 54 F. 2d 122 at 131; *Pittsburgh & West Virginia Ry. Co.* v. *United States*, 281 U. S. 479, 488, 41 F. 2d 806 at 811. Here, on the other hand, the State of Michigan is at least not the sole party in interest and the merger exchange-of-stock ratio was a principal issue in the merger agreement, in the proceedings before the Commission, and in the court below. In the present case the issue presented is imbedded in, and arises solely from, the terms and conditions of the merger agreement. It is not remote, indirect, or raised by parties who have no standing to do so. Appellants here seek to have recognized their specific property rights represented by stock certificates issued by Pere Marquette under its charter and the laws of Michigan, as against the deprivation thereof through execution of the merger agreement. It is to be noted, moreover, that, if there could otherwise be any question as to the non-applicability of the foregoing cases to the situation here, subsequently Congress amended 49 U. S. C. 5 (11) to provide "exclusive and plenary" jurisdiction in the Commission (54 Stat. 898, 908).

sions that the priorities of various classes of shareholders under a corporate charter must be recognized by courts and agencies which deal with the earnings or assets of their companies. *Otis & Co. v. Securities & Exchange Commission*, 323 U. S. 624, 634, and authorities there cited.

The duty of the Interstate Commerce Commission under section 5 (2) of the Interstate Commerce Act to determine the justness and fairness of merger plans is of the same type as that of the Securities and Exchange Commission under section 11 (e) of the Public Utility Holding Company Act of 1935 to determine the fairness and equitableness of simplification plans. In passing on action by the Securities and Exchange Commission involving a simplification plan, the Court has held that any arrangement or plan enforced without the consent of the parties affected by it, by which the subordinate rights and interests of stockholders are attempted to be secured *at the expense of the prior rights of other security holders*, is unfair and inequitable and will not be judicially sanctioned. In the *Otis* case cited above the Court said (p. 634):

> Like the bankruptcy and reorganization statutes, the Public Utility Holding Company Act, in providing that plans for simplification be "fair and equitable," incorporates the principle of full priority in the treatment to be accorded various classes of security interests. This right to priority in assets which exists between creditors and stockholders, exists also between various classes of stockholders. When by contract as evidenced by charter provisions one class of stockholders is superior to another in its claim against earnings or assets, that superior position must be recognized by courts or agencies which deal with the earnings or assets of such a company. Fairness and equity require this conclusion.

Under this principle of full priority no plan of merger or reorganization in which junior security holders are permitted to participate could be approved or permitted to

stand unless senior security holders received full compensation for their prior rights as established by their contract.

This rule has also been consistently applied by the Court in reviewing actions by the Interstate Commerce Commission in railroad reorganizations. *Case v. Los Angeles Lbr. Co.*, 308 U. S. 106; *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510; *Group of Investors* v. *Milwaukee Ry. Co.*, 318 U. S. 523. No reason has been stated by either the Commission or the court below why it should not apply here. That it should apply in the circumstances of this case appears from the language of the statute, prior administration, legislative policy, and the decisions of this Court. The issue, moreover, is not merely a statutory one, for it is grounded upon constitutional requirements (see the authorities cited in note 5 *supra*).

But there is a further reason for special scrutiny of the merger plan here proposed and approved below. Since 1929 Chesapeake and Ohio had controlled Pere Marquette through ownership of approximately 70% of the latter's common stock, had installed common officers and directors (R. 9-11), and had been "preparing" it for this merger (R. 45). The merger proposal was admittedly not an arms-length agreement even between carrier managements. It therefore required that special care be taken to protect minority interests. *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 492; *Geddes* v. *Anaconda Mining Co.*, 254 U. S. 590, 598 *et seq.*[10] "The stories of the dissolutions, mergers, and the consolidation, are striking examples of the manner in which a single dominant interest, having projected it-

[10] While the Commission here otherwise undertook to give the plan "close scrutiny" (R. 54), it wrongfully found the present issue beyond its competence (R. 52-55 and see points 1-3 inclusive of this argument *supra*). It thereby found itself without authority to deal with the very issue found to be important by courts and other tribunals. See *op. cit. supra* note 4. A common object of corporate reorganizations is to eliminate, by one device or another, cumulated arrearages of dividends. *Id.* 123, 125.

self into a situation of control, can thereafter dispose of the interests of minorities almost as it wills." *Op. cit. supra* note 4, p. 294 and see also pp. 114-116, 411, 415. The instant case is an extremely aggravated further example to the execution of which no court or administrative tribunal should lend support. For here the acquiring railroad has long managed Pere Marquette, has exercised its control to withhold the payment of dividends (R. 44-45), has thus caused the accumulation of arrearages it now seeks to wipe out, and as itself a major holder of common stock in Pere Marquette stands to benefit directly in the elimination of the accumulated prior equities to which the preferred shareholders in Pere Marquette would otherwise be entitled.

It is also to be noted that, in recent years, the necessity for protecting the cumulative equities of preferred shareholders has been heavily stressed by those appointed in law for the purpose.

> The provision for accumulation is a persuasive factor in inducing preferred stockholders to invest. (*Op. cit. supra* note 4, pp. 190 *et seq.*)
>
> The fundamental evil in these cases, of course, lies in the delusive character of the provisions in preferred stock for cumulative dividends. (*Id.* 117.)

There is therefore as great a need today for more, rather than less, intensive administration of existing regulatory powers over securities. See *id.* 197 and 413. In that regard, no distinction is to be drawn between railroads and other industrial corporations where securities are widely held.

CONCLUSION

In this case the ruling of the Commission has spawned confusion. There have been elaborate proceedings before the administrative agency, summary review thereof by a three-judge court, an abortive appraisal proceeding subsequently initiated by Chesapeake and Ohio in the local courts of Virginia (and sought to be removed to the federal court there by appellants), and an invitation by the Commission or the court below for appellants to institute still another proceeding under the laws of Michigan. The situation in this one case shows how completely the "exclusive and plenary" jurisdiction which Congress has conferred upon a federal administrative tribunal may be complicated, confused, and frustrated. Should a bifurcated or trifurcated jurisdiction be approved here, the cause of unification of carriers for the benefit of a national transportation policy will be ill served. Many questions will then border on the several jurisdictions and require a multiplicity of proceedings, which can only serve to deter unifications. These considerations confirm that Congress has wisely provided that the jurisdiction of the Commission shall be not only exclusive but *plenary*. They further demonstrate that the judgment below should be reversed and the cause remanded for proceedings before the Commission in which the rights of appellants shall be appropriately recognized, determined, and effectuated.

Respectfully submitted,

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Counsel for Appellants

December 15, 1947.

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Supreme Court of the United States

October Term 1947

No. 258

ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, JR., JAMES M. SCHWABACHER, ET AL,
Appellants

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

Appeal from the District Court of the United States for the Eastern District of Virginia

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REPLY BRIEF FOR APPELLANTS

The Interstate Commerce Commission and the carrier appellees have filed briefs defending the judgment below which sustained the order of the Commission. But on every essential issue the Commission and the appellee carriers differ materially. Thereby their briefs illustrate the confusion resulting from the Commission's action.

1. **The issue here is: What tribunal shall determine and apply the law to the facts?** Appellants have stated

the question here as whether the Commission unlawfully declined to take jurisdiction (question presented, brief 2).[1] The Commission states the question similarly, as whether it was required "to adjudicate and enforce the claimed contractual rights * * * of dissenting stockholders" (question presented, ICC brief 2).[2] The issue here, then, is simply whether the Commission is the tribunal for the adjudication of shareholders rights in connection with a merger, at least where the shareholders have preserved their rights.[3]

[1] "Jurisdiction is the power to adjudicate a case upon the merits, and dispose of it as justice may require." *The Resolute*, 168 U.S. 437, 439. See also *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 718. In the words of Mr. Justice Holmes, jurisdiction is "authority to apply the law to the acts of men". *Wedding* v. *Meyler*, 192 U.S. 573, 584. Here the Commission held the question of the merits "not within our province to decide" (R. 54), thereby plainly holding itself to be without jurisdiction. In this Court the Commission states that it was "disclaiming its jurisdiction to pass upon claims of contractual rights" (ICC brief 6).

[2] The Commission repeats this issue many times. It characterizes appellants' position in the administrative proceedings as "based upon the sole ground that the proposed report failed to accord them, as preferred stockholders, their asserted statutory and contractual rights claimed to have been preserved to them under the laws of the State of Michigan" (ICC brief 4). It twice repeats this statement of appellants' position (*id.* 5, 10) plus appellants' contention "that the Commission is the one and only forum in which such rights may be adjudicated and enforced; and that consequently the Commission's failure to adjudicate these claimed rights and make appropriate provision for their enforcement constituted a failure to perform its full statutory duty" (id. 5).

[3] The issue was raised in the administrative proceedings as the Commission's brief admits (ICC brief 4, 5). But the court below (appellants' brief 10, 21) and the carrier appellees here (C & O brief 2, 22, 34, 42-44) apparently have drawn a distinction between minority stockholders and "dissenting" stockholders. Appellants as holders of Marquette preferred did not vote for the merger, voted against it, and also filed formal "dissents" from the merger. They did the latter for two reasons: The proxy statement submitting the merger to vote of the shareholders appears to require "dissatisfied stockholders" to file notices of dissent (R. 99, 175-176). Secondly, Michigan law under which they held their shares has long required that objectors shall take care not to waive their rights. *Swartwout* v. *Michigan Air Line R. R. Co.*, 24 Mich. 389, 392-394; *Monroe* v. *Fort Wayne etc R. R. Co.*, 28 Mich. 272, 274-275; *Wells* v. *Rogers*, 60 Mich. 525, 532, 27 NW 671. Hence the only significance of the word "dissenters" is that those who have dissented have taken care to preserve their rights in every conceivable way. Manifestly the preservation of their rights by dissenting could not possibly place appellants in a worse position than if they had made and preserved the issue without necessity of formally dissenting (appellants' brief 20).

In this Court the Commission disclaims that it did anything more than leave the merits to judicial tribunals (ICC brief 21-22):

> A factual finding that [minority stockholders] will be accorded fair and equitable treatment is far removed from adjudicating the contractual right of dissenters and enforcing such rights under the power to annex just and reasonable conditions to the approval. * * * The Commission * * * left to the courts the question as to whether dissenting stockholders were entitled to better treatment in satisfaction of a contractual obligation due them from Pere Marquette.

This representation is made to this Court pursuant to statutory authority (49 U.S.C. 16(11)). The Commission is in the best position to judge of what it did and what it intended. Compare *Federal Comm'n* v. *Broadcasting Co.*, 309 U.S. 134, 145 n. 6; *A. T. & T. Co.* v. *United States*, 299 U.S. 232, 241. The carrier appellees are therefore in no position to assert the contrary.

The carrier appellees appear to adopt a different interpretation of what the Commission did.[4] Actually, how-

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The Commission makes no assertion to the contrary here. But the carrier appellees seem to attach importance to the status of appellants "as dissenting stockholders" (C & O brief 2). The Commission used the phrase to characterize appellants in its report (R. 54) and, in the complaint filed in the court below, appellants therefore paraphrased the ruling (R. 3 ¶6) to which they attached the full report of the Commission (R. 5 *et seq.*), thereby making it a part of the pleading "for all purposes" (Rule 10(c), Federal Rules of Civil Procedure; compare C & O brief 18-19 n. 10). Appellants do not contend that, by dissenting, they did more than preserve their rights (C & O brief 22). Save that their rights to a determination of the merits were thereby surely preserved, appellants do not demand "special treatment" (C & O brief 33-34) or contend that they became a "favored class" (*id.* 42) or so gained "additional rights" (*id.* 43).

[4] Appellants' brief points out that, although the Commission considered all other shareholders' rights, it held itself without authority to determine or accord appellants their full prior equities arising by virtue of accumulations of unpaid dividends on their preferred stock (appellants' brief 19-20). The carrier appellees, however, assert that there was "an administrative evaluation of all their stipulated priorities in the light of all the pertinent facts" (C & O brief 3) and they insist that the Commission "weighed all the stipulated priorities of the Pere Marquette Preferred, including its accumulated dividends and preferential rights in

ever, they do not say that the Commission determined and applied appellants' rights with respect to cumulations of preferred dividends but, instead, they argue that on the merits appellants have no rights in that regard (C & O brief 11-12, 35 *et seq.*). Indeed, in terms of "remedy" the carrier appellees admit that the Commission

> made no effort to determine whether any such remedy was actually available, still less to determine what it would actually yield on prosecution, if available * * * (*id.* 51.)

The issue thus posed on the merits, whether in terms of right or remedy, is the subject of point 3 of this reply brief *infra*. Both the Commission and the carriers acknowledge that the issue concerns the right of appellants to recognition of equities arising by virtue of cumulations of unpaid dividends on their preferred stock. The Commission contends that the subject is not within its jurisdiction to consider or determine as set forth in point 2 *infra*. The carrier appellees take a different ground and insist that, on the merits, there is nothing more for the Commission to consider or determine as set forth in point 3 *infra*.

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the event of liquidation, in comparison with the terms and characteristics of the new securities, in the light of all the pertinent facts, including the history of the past and the prospects for the future, with respect to business, earnings, assets and other elements of value" (*id.* 21). They find the issue to be not "not * * * whether the full priority rule applies in mergers under Section 5, but whether the Commission exercised its informed discretion in accordance with that standard" (*id.* 29). They state that "the Commission did not disclaim jurisdiction to enforce the just and reasonable equivalent of the old securities * * * but on the contrary undertook to apply that standard with all the resources at its command" (*id.*). They ground this assertion on the Commission's review of the merger plan (*id.* 29-30) whereas here the point is that, in what it did, the Commission avowedly declined to concern itself with a determination or application of full prior equities arising from accumulated dividends on preferred stock (appellants' brief 19-20). The carrier appellees conclude that the Commission "did its full duty to assure 'just and reasonable' treatment by an administrative evaluation of all the stipulated priorities in the light of all the pertinent facts and its action, being in accord with legal standards, is conclusive" (C & O brief 45).

2. **The Commission's present attempt to limit its jurisdiction, respecting mergers, to "transportation" issues as it distinguishes them from those respecting "private rights" directly involved therein is contrary to the statute, departs from the established course of administration and judicial decision, and is unworkable.**—Unlike the carrier appellees, the Commission attempts to carve out of the statute an area where, it here insists, it has no proper jurisdiction because "private rights" are involved (ICC brief 11, 22-31) and because of the burden which otherwise it would be required to shoulder (*id.* 32). But the latter reason, based on a desire to lighten the administrative load, is no legitimate ground for departure from the Act of Congress. *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 198. And whether private rights are beyond the Commission's powers of protection depends upon the terms of the statute. Appellants do not ask that the Commission adjudicate private rights "as such" (ICC brief 11) but only as they are directly and inextricably involved in merger terms which the Commission validates (appellants' brief 25 n. 9). Nor, for the same reason, is it suggested that the Commission is given "carte blanche authority to act on any subject without reference to its relationship to the public purposes of the Act" (ICC brief 12). It may well be admitted that "the public interest inherent in the preservation of adequate and efficient transportation service is the dominant note" of the statute (*id.* 13). But that private rights must as often as not be determined and enforced in executing public policy has been made familiar by the administration of the federal labor laws, insurance laws, utility laws, and so on.[5]

[5] Thus, for example, the Labor Board may set aside private contracts or award back pay to employees. But its proceeding "is not for the adjudication of private rights" since it "acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce". *Nat. Licorice Co.* v. *Labor Board*, 309 U.S. 350, 362. "The Interstate Commerce Act * * * imposes upon the carrier many duties; and it creates in the individual corresponding rights." *Federal Trade Comm.* v. *Klesner*, 280 U.S. 19, 26. "An action before the Interstate Commerce Commission is akin to an inclusive equity suit in which all relevant claims are adjusted." *Rochester Tel. Corp.* v.

Here the Commission's position is that, where private rights are concerned, the courts have original jurisdiction and the administrative agency has none.[6] The situation thus presupposed by the Commission is the contrary of that usually obtaining, in which the administrative agency has the primary jurisdiction and the courts have a limited one of review.[7] The Commission seeks to justify this unusual result by limiting its "exclusive and plenary" jurisdiction to the "transportation" objectives stated in section 5 of the Interstate Commerce Act (ICC brief 18-19). Its theory is this: Transportation objectives are stated in subparagraphs (c), (d), and (e) of section 5(2) of the Act and "no conditions are inserted with respect to stockholders' rights" (*id.* 15, 19). Therefore the terms "exclusive and plenary" in section 5(11) are to be operative "only within the delegated authority as defined by other provisions of Section 5" (*id.* 19). Constitutional problems, it argues, would otherwise arise from "such drastic

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United States, 307 U.S. 125, 142. The necessity of determining and dealing with private rights in connection with corporate reorganizations, under statutes vesting federal agencies or tribunals with jurisdiction over such reorganizations, is set forth in appellants' opening brief (point 4, pp. 35-28) and is one of the subjects of point 3 of this brief *infra*.

[6] The position of the Commission is that "there is nothing in the statute "which lends support to the argument that, the Commission, in dealing with consolidations and mergers embraced by those provisions, has succeeded the courts in the adjudication of contractual rights of parties affected thereby" (ICC brief 11). "State law remains effective, whether it be to govern the corporate procedure or to provide a means of paying off non-assenting shareholders" (*id.* 14). "It is not to be presumed that Congress by the mere statement that 'the authority conferred by this section shall be exclusive and plenary,' intended to invest the Commission with jurisdiction to adjudicate the infinite variety of legal issues which might arise in connection with mergers to the exclusion of all judicial process" (*id.* 19).

[7] Ordinarily any other relationship is held to be "wholly inconsistent with the administrative power conferred". *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 440-441. For the consistent application of the rule see *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 138 *et seq.*; *Smith* v. *Hoboken R. Co.*, 328 U.S. 123, 128-129; *Illinois Comm'n* v. *Thomson*, 318 U.S. 675, 686; *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 404; *St. Louis, etc. Ry.* v. *Brownsville Dist.*, 304 U.S. 295, 301; *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 343 *et seq.*; *Terminal Warehouse* v. *Penn. R. Co.*, 297 U. S. 500, 513-515; *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, 311.

delegation of power to an administrative body * * * to be read out of three words, 'exclusive and plenary'" (*id.* 18-19).* "Important powers should not be read into the Act by implication but should be conferred in clear and unmistakable terms" (*id.* 19). But the vice of this argument is that it ignores the specific terms of the statute, the setting of the quoted words in it.

The statute involved does many things. In paragraphs (c), (d) and (e) of section 5(2), it states certain objectives of a public interest nature for the Commission to enforce, since Congress does not confer administrative authority except for some national purpose and a failure to state a public policy would render the statute subject to attack on constitutional grounds. *Currin* v. *Wallace*, 306 U.S. 1, 16-18, and note 8 *supra*. Also, in providing for the administrative execution of that policy Congress has not provided for operations after the fact (as in the simplification of holding company systems under the Public Utility Holding Company Act), but section 5(2) of the Interstate Commerce Act has required the approval of railway consolidations as a prerequisite to validity:

> (a) It shall be lawful with the approval and authorization of the Commission * * * for two or more carriers to consolidate or merge their properties * * * into one corporation * * *
>
> (b) If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction * * * will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable * * *

These provisions can and do stand independently of paragraphs (c), (d), (e), and (f) of section 5(2). As such

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*But see *United States* v. *Rock Royal Co-Op*, 307 U.S. 533, 574; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 397-398; *Hirabayashi* v. *United States*, 320 U.S. 81, 102.

they are plainly within the permissible scope of delegations of authority. *American Power Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 104-105.

There are two further reasons why the Commission's theory of limited objectives, and hence limited administrative powers, will not hold. Section 5(11) provides that

> The authority conferred by this section shall be exclusive and plenary * * *

These words must be taken together, as well as separately. "Exclusive" would seem to rule out primary jurisdiction on the part of any other tribunal whether state or federal (see note 7 *supra* and note 6 of appellants' opening brief at page 15). "Plenary" means full and complete (*id.* 15). "Exclusive and plenary" therefore leaves no room for primary jurisdiction in any other tribunal and no want of authority in the Interstate Commerce Commission. From the standpoint of language there is thus full jurisdiction in the Commission over "private rights" as well as "transportation issues". Secondly, section 20a is also operative here, because no carrier may merge without an exchange of securities and assumption of liabilities. The extensive provisions of this section, in which by subsection (7) the authority of the Commission is also "exclusive and plenary", contain no specification of separate transportation objectives so that the Commission's theory respecting section 5 (brief 14-15, 19) cannot apply. Since the Commission did not undertake to determine the liability to the holders of Marquette preferred (R. 54-55), it could not exercise its jurisdiction under section 20a save in a speculative or "exploratory" fashion (ICC brief 6; appellants' brief 21-22). It is manifestly untrue, as the Commission here asserts, that section 20a deals "with transactions having only prospective effect" or that under it "the question of adjustment of existing private contractual rights, such as are necessarily involved in a merger, was not present" (ICC

brief 17). The report and order here involved deal expressly with the issuance of securities under section 20a with reference to the very "private rights" here in issue (R. 55-56, 64-65).

Moreover, it is impracticable—if not wholly impossible—to draw a line between shareholders' rights and transportation issues when the former are involved in merger terms presented to the Commission for decision. The different positions of the Commission and the carrier appellees in this very case illustrate the inevitable confusion arising therefrom, for the Commission denies that it has taken jurisdiction here (point 1 *supra*) while the carrier appellees insist that it has done the contrary (note 4 *supra*). The Commission's report in this case demonstrates the inseparable nature of the problem (see appellants' opening brief 19-20). Manifestly the Commission could not approve a merger plan which omitted recognition of a whole class of stock or bonds or debts. It therefore interprets its jurisdiction as a matter of degree. In attempting to rationalize that irrational position it therefore makes a number of necessarily inconsistent arguments as follows:

(1) Apparently it would assume jurisdiction even over private rights or contractual arrangements "as it finds necessary" (ICC brief 14-15). Beyond matters of "national transportation policy" it argues that "the scope of what it should consider * * * is left to the Commission's discretion" (*id.* 15).* But this is a change of position, for its report finds the issue here beyond its "province to decide" (R. 54). Later in its present brief it argues for ten pages that it "is without power" (ICC brief 22 *et seq.*).

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* Assuming *arguendo* that the Commission has a discretion, the cause would nevertheless be required to be remanded in order that it may exercise that discretion. *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 194; *Siegel Co.* v. *Trade Commission*, 327 U.S. 608, 614. *Cf. United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 488-489.

(2) Again, the Commission says that it "has insisted upon the submission of terms and conditions which will protect the interests of minority stockholders" but differentiates the cases on the ground that in some of them protection was "necessary and incidental to its determination of the public interest" (ICC brief 21). Such a form of indefinite jurisdiction runs counter to the concept of administrative jurisdiction which this Court has established. "The power to decide a matter can hardly be made dependent on the way it is decided." *Bethlehem Co.* v. *State Board*, 330 U. S. 767, 775, and see the authorities listed in note 6 of appellants' opening brief at page 15.

(3) The Commission ineffectually attempts to distinguish its practice of according protection to minority shareholders in acquisition-of-control cases (ICC brief 10, 21). It argues that in such cases, unlike mergers, its approval is "final and binding upon the minority interests" (*id.* 10). But orders in that type of case are as much subject to judicial review as in a merger case such as here involved. *Chicago Junction Case*, 264 U.S. 258, 270, and *Cleveland, C. C. & St. L. Ry. Co.* v. *Jackson*, 22 F. 2d 509, 511, both cited by the Commission in its report here (R. 54). Moreover, it is obvious that an actual merger, which completely extinguishes a corporation as is here the case (R. 20, 103), inevitably operates more completely and more drastically upon the stock in the extinguished corporation than in the case of a mere acquisition of control through ownership of some stock. That "single ownership is created and separate ownership ceases" (ICC brief 21) aggravates rather than ameliorates the lot of minority interests.

(4) It is therefore with complete inconsistency that the Commission states that "it has always been the Commission's practice in Section 5 proceedings not to involve itself in private disputes between stockholders or others arising from contractual arrangements" (*id.* 20). None

of the administrative M.C.C. opinions cited for this proposition on page 20 of the Commission's brief relate to minority shareholders' rights but involve instead various claims of outsiders or, in one instance, an attempt of the two principals to have the Commission adjudicate a dispute between them as to the terms of their own acquisition contract. The Commission's present disavowal of responsibility in cases involving "contractual arrangements" is to be contrasted with the recent ruling of this Court that, under this statute, the Commission and "not the courts" has exclusive authority to determine the terms and conditions under which trackage rights may be acquired notwithstanding that they "are consensual arrangements between the parties". *Thompson* v. *Texas Mexican Ry. Co.*, 328 U. S. 134, 146-150.

(5) The final and extended argument of the Commission is that it is

> without power to pass upon private rights which are neither dependent upon or ancillary to the exercise of its statutory authority. (Brief 22 *et seq.*)

This statement of course begs the question. Whether the rights here involved are "dependent upon" the exercise of its statutory authority is the problem in this case. More specifically, the question here is whether its "statutory authority" is "exclusive and plenary" respecting the issue in this case. In the present case the issue is imbedded in, and arises solely from, the terms and conditions of the merger agreement. As the following analysis shows, the cases now strongly relied upon by the Commission (brief 23-31) *did not involve mergers and consequently presented no corporate reorganization issues.*

Cleveland, C. C. & St. L. Ry. Co. v. *United States*, 275 U. S. 404, was not a merger case but involved an order of the Commission directing a carrier to establish a switch connection under section 1(9) of the Act. Similarly *Pittsburgh & West Virginia Ry. Co.* v. *United States*, 281 U.S.

479, was not a merger case but involved an order of the Commission permitting a carrier to contract, over the protest of a minority stockholder, for the use of certain facilities and acquire the use of others. *Claiborne-Annapolis Ferry* v. *United States*, 285 U.S. 382, involved nothing more than a competitor's challenge to an order of the Commission permitting a carrier to establish a ferry. *N. Y. Central Securities Co.* v. *United States*, 287 U.S. 12, was not only not a merger case but involved acquisition of control by a lease. Here the Commission has attempted to distinguish that very type of case as one requiring a protection of minority shareholders (ICC brief 10, 21). Moreover the excerpt which the Commission quotes (*id.* 23) demonstrates that a governing factor in the case was the *permissive* nature of the administrative order (287 U.S. at 26-27) whereas here the Commission's action *forces* appellants to accept an exchange of stock which impairs their equity arising by virtue of cumulated unpaid dividends. The three lower court cases with which the Commission concludes its brief involved an acquisition of control (brief 25-26), a motor carrier lease (*id.* 26-28), and a stockholder's derivative action in which an attempt was made to have a finance proceeding before the Commission treated as res adjudicata of issues in the private action (*id.* 28-31).

From these cases the erroneous generality is drawn that "the determination of rights asserted to exist by virtue of contract is for the courts and not the Commission" (*id.* 32). Manifestly, they signify nothing more than that not all contract rights or torts need be determined in every kind of Commission proceeding. The requirements of law are very different in corporate reorganization cases. The subject has been epitomized by this Court in *Otis & Co.* v. *Securities and Exchange Commission*, 323 U.S. 624, 634:

> When by contract as evidenced by charter provisions one class of stockholders is superior to another in its claims against earnings or assets, that superior posi-

tion must be recognized by courts or agencies which deal with the earnings or assets of such a company.

The law in this respect is more fully set out in the fourth point of appellants' opening brief at pages 25-29. Unlike the Commission, the carrier appellees admit that state of the law.[10]

3. **Apart from the issue as to what tribunal is to decide the matter as set forth in points 1 and 2 above, the substantive law applicable in this case requires ultimate decision for appellants on the merits.**—If appellants are correct in the view that the Interstate Commerce Commission has exclusive and plenary jurisdiction of the issue here involved (points 1 and 2 *supra*), presumably the cause will be remanded to the Commission without further proceedings here on the merits.[11] In that respect the issue on the merits is a statutory one (see appellants' opening brief 13 *et seq.*) although there is a potential constitutional issue if the Interstate Commerce Act should be interpreted to permit a destruction of shareholders' rights

[10] They state that "Section 5 of the Interstate Commerce Act incorporates the same standard of equity practice that is embodied in the Bankruptcy Act and the Public Utility Holding Company Act" (C & O brief 21, 27). Both section 5 of the Interstate Commerce Act and railroad bankruptcy legislation, they admit, "may well be thought a part of a Congressional effort to center in the Commission, as the single expert tribunal, the administrative determination of all these matters throughout the field" (*id.* 26). "Exclusive and plenary", they acknowledge, are words which are "ordinarily given the effect of preempting the field, at least on all subjects touched in the Federal regulations" (*id.* 27). In this respect the present position of the carrier appellees is designed to foreclose further resort to the courts despite the Commission's contrary ruling in this case (R. 54), its position here (point 1 *supra*), and the representations of all the parties at the argument in the court below (see the references last listed on page 10 of appellants' opening brief).

[11] This Court requires the Commission to take jurisdiction when it has declined to do so or to discharge a duty laid upon it by statute. *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 622, and cases there cited. For such a remand in a corporate reorganization case see *Group of Investors* v. *Milwaukee R. Co.*, 318 U.S. 523, 571. A question of state law will not be resolved by this Court in the first instance. *Huddleston* v. *Dwyer*, 322 U.S. 232, 237.

as demonstrated by the decisions of this Court and the relevant legislative history of the statute here involved.[12] It is also to be noted that appellants make no demand that they be bought off forthwith in cash but simply that, in the exchange of securities, their full prior equities arising by virtue of cumulations of unpaid dividends be recognized in the formulation of the exchange ratio.[13]

The Commission here referred appellants to separate proceedings under state law for redress (R. 54; ICC brief 10) and it maintains that "state law remains effective" because "the Commission's authority does not permit it

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[12] See appellants' opening brief 14 note 5. The carrier appellees here twice assert, in passing, that section 5(2) of the Interstate Commerce Act overrides state law if the latter "were to the effect that a merger automatically matures a liquidation preference" (C & O brief 22) and that state law respecting dissenters may be overridden by the federal statute "where the potential burden * * * would * * * be so large as to impair the railroad's capacity for continued efficient public service" (*id.* 48). In this case the Commission gave its opinion that "it is difficult to conceive of a restraint or limitation on contemplated unifications better serving to frustrate the national transportation policy than provisions of state laws for compensation of dissenting stockholders on specified bases" (R. 53). That statement is unclear as to whether the Commission was referring to payments in cash (see note 13 *infra*) or merely the exchange ratio of securities. In any event it did not, in this case, assume to deny effect to state laws if non-assenting shareholders should pursue their remedy therefor separately (R. 54). Although its brief here asserts authority over "obstacles" in the way of state law, it also states that "the Commission's authority does not permit it to set aside these laws" respecting "paying off non-assenting shareholders" (ICC brief 14). However, on an earlier page, it asserts that it should not "have to recognize asserted legal rights as the *sole* measure of fair treatment" (*id.* 9). But none of these arguments are pressed on the part of the Commission and, since it has not assumed in this case to affect rights of shareholders under the law of the state of incorporation, no constitutional issue is presented.

[13] The carrier appellees appear to interpret appellants' claims as for "immediate payment" (C & O brief 28), "present payment" in cash (*id.* 35), a remedy for "payment in cash" or "a money judgment" (*id.* 46), "cash payment to dissenters * * * as a condition to the merger privilege" (*id.* 48), or a "cash recovery" (*id.* 51-52). Appellants, on the contrary, have adopted the formula specified by this Court for cases such as this and have asked for *either* cash or the equivalent of their rights in an exchange of securities. *Geddes* v. *Anaconda Mining Co.*, 254 U.S. 590, 598; *Clearwater* v. *Meredith*, 1 Wall. 25, 39-41. The customary offer of cash or securities is illustrated in the first two merger cases cited by the carrier appellees in their brief at page 34 note 16. Also see their recognition of demands for "equivalents" in such cases (*id.* 46) and their well taken argument that shareholders may be satisfied in securities (*id.* 41).

to set aside these laws" (*id.* 14).[14] The carrier appellees, however, argue that federal law is the sole criterion for the decision of the issue on the merits in this case (C & O brief 35-49).[15] For this conclusion they cite *Vanston Com-*

[14] The Commission argues in its brief that appellants have "evaded" the issue here, apparently because their rights under Michigan law have not "already been incontestably established" (ICC brief 7). They contend that this is an "obvious infirmity" in appellants' position and complain that appellants "seek to have the Commission *judicially* determine the nature and extent of *private contractual rights* and use its authority to impose conditions upon its approval of the merger" (*id.* 8). The Commission's distaste for the task appears from the following statement in its report in this case (R. 53): "Counsel for Pere Marquette has joined with opposing counsel in debating the dissenters' rights under Michigan laws." Apparently the design of this argument is to bolster the Commission's failure to take jurisdiction as set forth in point 2 *supra*. However, it is to be noted that, if the Commission is the proper tribunal to determine the issue on the merits under state law, the facts that appellants have not reduced their claims to judgment in Michigan or that there may be the normal difficulties in determining and applying their rights would not defeat jurisdiction. Where state law applies, it is the duty of federal tribunals to "ascertain and apply it". *Huddleston* v. *Dwyer*, 322 U.S. 232, 236. They must "ascertain from all available data what the state law is and apply it." *West* v. *A. T. & T. Co.*, 311 U.S. 223, 237. A dispute as to the application of state law to the facts of a particular case did not deter this Court from deciding *Erie R. Co.* v. *Thompkins*, 304 U.S. 64, 80.

[15] They argue that, under federal law derived from such statutory provisions as "just and reasonable", "a merger does not mature a stated liquidation preference" (C & O brief 35, 38, 41). *Securities and Exchange Commission* v. *Chenery*, 318 U.S. 80 and 332 U.S. 194, which they cite and discuss (C & O brief 39-40) has no similar corporate reorganization issue.

Although the carrier appellees have taken the position that in this case the Commission *did* determine the issue on the merits (note 4 *supra*) and was required to do so by the statute here involved (note 10 *supra*), they nevertheless must acknowledge the possibility of recourse to state procedure (C & O brief 45 *et seq.*) because the Commission did so (R. 54 and point 2 *supra*). They straddle this dilemma by apparently distinguishing between rights and remedies, contending that there might be "alternative remedies" in Michigan with which the Commission need have no concern "in its application of the Federal standard" (C & O brief 47, 49, 51, 42). But, in all its history, this Court has never relegated parties to empty "remedies". On the contrary "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood*, 327 U.S. 678, 684. Conversely, a federal tribunal "may afford an equitable remedy for a substantive right recognized by a state even though a state court cannot give it." *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 106. "If there be an admitted wrong, the courts will look far to supply an adequate remedy." *De Lima* v. *Bidwell*, 182 U.S. 1, 176-177. Remedies may not be so changed as to "impair the value of the right". *Richmond Corp.* v. *Wachovia Bank*, 300 U.S. 124, 128. Nor is it permissible "to make the remedy a shadow" since "reality rather than the form or label" controls. *Worthen Co.* v. *Kava-*

mittee v. *Green*, 329 U.S. 156, 162-163, which was a bankruptcy case and did not involve a corporate reorganization. They also cite *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624, but their quotation (C & O brief 39) refers merely to this Court's commonplace ruling that "the applicability" of state law must be determined under principles of federal law (323 U.S. at 636 and note 18).[16] Here, whether regarded as primarily or secondarily a matter of state or federal law, the contractual or "charter" rights of appellants cannot be determined without reference to the law of Michigan under which they arise (appellants' opening brief, note 7 at page 22). If regarded as a problem in "federal" law because determined and applied by a federal tribunal under a federal statute, the cumulated accruals of unpaid dividends must nevertheless be recognized in the merger as part of appellants' equities. *Petition of Portland Electric Power Co.*, CCA 9, 162 F. 2d 618, certiorari denied Nos. 387-388 December 8, 1947. Manifestly the same result would ensue if the problem were regarded as one of state law in whole or part, as the last cited case also demonstrates.

Here the appellant shareholders derive their rights from relevant corporation law of Michigan (appellants' open-

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naugh, 295 U.S. 56, 62. See also *Ex parte Young*, 209 U.S. 123, 147; *Oshkosh Waterworks Co.* v. *Oshkosh*, 187 U.S. 437, 439. Rights and remedies are inseparable. *White* v. *Hart*, 13 Wall. 646, 653; *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 552; *Bronson* v. *Kinzie*, 1 How. 311, 316; *Marbury* v. *Madison*, 1 Cranch 137, 163.

[16] The carrier appellees place great reliance on the *Otis* case (C & O brief 38-41) because there this Court refused to require all common stock to be wiped out in a corporate simplification proceeding under the Public Utility Holding Company Act. But that part of the ruling in that case is not applicable here for the following obvious reasons: No such facts have been made to appear here. There, if the preferred received all the new securities, the common would not only be completely and unjustly eliminated (323 U.S. at 632) but the preferred would eventually receive a windfall beyond their accrued rights (*id.* 637). There the merger was mandatory, while here it is a matter of contract between the corporate parties. There the compulsory federal statute had been adopted after the shareholders' contracts had vested (*id.* 37) while here voluntary railroad mergers were generally known and sanctioned long prior to the organization of Marquette. For the latter reason the present case falls within the scope of the contrary *Continental* and *Reading* cases as the opinion in the *Otis* case notes (*id.* 638-639).

ing brief 9 n. 3) and the Marquette charter (*id.* 8 n. 2). The appellees cite no Michigan law to the contrary.[17] The

[17] The carrier appellees contend that in Michigan corporations dividends are payable only out of earnings when declared (C & O brief 35 n. 18). *Knight* v. *Alamo Manufacturing Co.*, 190 Mich. 223, 154 NW 24, was simply the attempt of a shareholder to force a corporation to pay dividends. The court held that the word dividend "does not mean simply profits" and that payment might be forced by equitable action but not one at law (p. 226). *Ellsworth* v. *Lyons*, 181 F. 55 was a bankruptcy case in which the court merely refused to permit assets to be paid to stockholders to the detriment of unsatisfied creditors. In *Lockhart* v. *Van Alstyne*, 31 Mich. 76, per Cooley, J., the Supreme Court of Michigan declined to permit the payment of dividends from other than profits expressly excepting, however, corporate reorganization cases (p. 79).

The quoted language from the *Guardian* case (C & O brief 36 n. 21) is immaterial here because, in the instant case, it is expressly recognized that the corporate existence of Marquette is terminated by this merger (R. 20, 103). For the same reason the Virginia case (C & O brief 36 n. 22) is immaterial here.

The authority of Michigan corporations to merge (C & O brief 12 n. 7) is immaterial to the issue here. *Kirby* v. *Saginaw Hotels Co.*, 253 Mich. 306, 235 NW 153, merely held that a shareholder, who had become such after the enactment of the statute permitting consolidations, could not defeat a merger (p. 310). *Wells* v. *Rogers*, 60 Mich. 525, 27 NW 671, merely held that a shareholder who had joined in a consolidation could not then avoid liability on his subscription to stock. *Detroit etc. Rr.* v. *Starnes*, 38 Mich. 698, holds only that a consolidation successor corporation succeeds to rights under a stock subscription (p. 701). *Monroe* v. *Fort Wayne etc. R. R. Co.*, 28 Mich. 272, is to the same effect except that, in addition, the subscriber was "an agreeing party" to the consolidation (pp. 274-275). The same was true in *Swartwout* v. *Michigan Air Line R. R. Co.*, 24 Mich. 389, 392-394, 404. *Voight* v. *Remick*, 260 Mich. 198, 244 NW 446, 449, certiorari denied 289 U.S. 756, holds that "the relation between a corporation and its stockholders is contractual in nature" (pp. 204-205), that by consolidation or otherwise the majority thereof may not manipulate its assets "in any manner which is unequal, unfair, inequitable, oppressive, discriminatory, or illegal" (p. 210), and that corporate shares may not be

> manipulated to the detriment of minority stockholders. A part of the stockholders of the corporations involved have no right to manipulate stock and property under their management and control in violation of the trust imposed in them as stockholders so that they acquire either an undue advantage or such stock and property on terms other and different from that accorded to minority stockholders who may not have agreed with their plan of management and control.

Thus the Michigan authorities cited by the carrier appellees support appellants instead. The *Sutton* case and other relevant authorities are noted briefly in appellants' opening brief at pages 8-9 notes 2 and 3. In the case at bar it is to be noted that the carrier appellees have long had control of Marquette (R. 9-11) and by this merger simply desire to effect a corporate reorganization in securing a physical and legal consolidation of properties. In *Stevenson* v. *Stickelsteel Lumber Co.*, 219 Mich. 18, 188 NW 449, the Supreme Court of Michigan held that a dissolution, in which a director had a personal interest, "to the end that he may get control of the business in his own right" renders him without capacity to act as a fiduciary (p. 29).

references of the carrier appellees to the law of other states are of course irrelevant, because corporation laws and charters differ even within a single state.[18] There are, indeed, states which, under some of their corporation laws, permit some writing down of accruals of dividends either through direct charter amendments[19] or by the merger process.[20] But none of these considerations are pertinent

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[18] The carrier appellees rely on scattered authorities from various states, chiefly "appraisal" cases (C & O brief 35 n. 20 and 37 n. 23). These gleanings from the morass of state corporation law manifestly cannot control the disposition of the merits here nor even illuminate the way. The carrier appellees have attempted in every possible way to import "appraisal" into this case. They offered to do so before the Commission (R. 54). They have instituted an appraisal proceeding in Virginia, naming all dissenters (C & O brief 11 n. 5). The attempt to have the Virginia law of "appraisal" apply is simply an indirect method of avoiding the very different law of Michigan. *Adams* v. *U.S. Distributing Corporation*, 184 Va. 134, 34 SE 2d 244. Admittedly Michigan is not a state which permits, in carrier consolidations or mergers, the writing down of accrued dividends through "appraisal" (R. 99). For the evils of that system see the report of the Securities and Exchange Commission to Congress entitled *Management Plans without Aid of Committees*, 1938 (appellants' opening brief 9 n. 4 and 22 n. 8). It is there noted that mergers may be selected for readjusting shareholders' rights where other methods of corporate reorganization would not permit the same result (*id.* 596-597) and that, in particular states, appraisal may or may not supersede equitable remedies (*id.* 602-609). See also *Roessler* v. *Security Sav. & Loan Co.*, 147 Ohio St, 480, 72 NE 2d 259, holding that intrinsic, rather than market, value controls on appraisal proceedings. Appraisal statutes applied and were recognized in the merger decisions of the Commission listed by the carrier appellees in their brief at page 34 n. 16.

[19] In these, and also merger, cases some courts preclude "conversion" of accrued arrearages of preferred. *Pearson* v. *Clam Falls Co-Op Dairy Asso.*, 243 Wis. 369, 10 NW 2d 132; *Harbine* v. *Dayton Malleable Iron Co.*, 61 Ohio App. 1, 22 NE 2d 281, 286-287; *Mills* v. *Penn-Lex Co.*, 36 NE 2d 828 (Ohio App.); *Wildermuth* v. *Lorain Coal & Dock Co.*, 37 NE 2d 201; *Yoakam* v. *Providence Biltmore Hotel Co.*, 34 F. 2d 533, 542.

[20] The carrier appellees cite a number of cases purporting to be of this type (C & O brief 35 n. 20 and 37 n. 23):

Federal United Corp. v. *Havender*, 24 Del. Ch. 318, 11 A 2d 331, was a suit to void a merger for failure to pay "in money dividends accrued" (p. 322). The court held that a dissenting stockholder had no right to veto a merger (p. 334) and that his right to accrued dividends was defeasible (p. 335). He had failed to ask appraisal under the Delaware statute and hence "a valuation cannot be demanded now" and "complainants must accept the terms of the merger agreement" (p. 344). There were also laches (pp. 344-348). In *Hottenstein* v. *York Ice Machinery Corporation*, 45 F. Supp. 436, no issue was made as to preferred arrearages in the trial court (p. 439) but on appeal Delaware law was construed to permit the cancellation thereof in the absence of gross fraud. 136 F. 2d 944. To the same effect is *Porges* v. *Vadsco Sales*

here, because it is admitted, and indeed is a term of the merger itself, that Michigan provides no "appraisal" procedure for the writing down of the equities of shareholders who do not assent to a merger. (R. 99 and see R. 54).

Respectfully submitted,

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Counsel for Appellants

January 1948

Corp., 32 A 2d 148 (Del. Ch.), and *Langfelder* v. *Universal Laboratories*, 163 F. 2d 804. Compare *Zahn* v. *Transamerica Corporation*, 162 F. 2d 36.

Hubbard v. *Jones & Laughlin*, 42 F. Supp. 432, arose under the laws of Pennsylvania and held no more than that a dissenter, who had not asked for statutory appraisal, could not demand cash for the par value of his preferred stock plus arrearages of dividends (see note 13 *supra*). Contrary to the contentions of the carrier appellees is *Petry* v. *Harwood Electric Co.*, 280 Pa. 142, 124 A 802. The statutory amendment which appellees cite (C & O brief 37 n. 23) does not appear to affect this decision. It is to be noted that, in *Mortgage Bldg. and Loan Case*, 334 Pa. 81, 5 A 2d 342, the Supreme Court of Pennsylvania has held that dissenters become creditors.

Anderson v. *International Minerals & Chemical Corp.*, 295 NY 343, 67 NE 2d 573, was a case in which the plaintiff had failed to ask statutory appraisal and was therefore denied payment in cash. The court said that, on proper request, "every right of a dissenting shareholder is to be appraised and paid for" (p. 350). See also *In re O'Brien*, 45 NYS 2d 208; *Application of Behrens*, 61 NYS 2d 179; and *Amella* v. *Consolidated Edison Co. of N. Y.*, 73 NYS 2d 263, holding that actual value rather than market value governed appraisal. In *Kavanaugh* v. *Kavanaugh Knitting Co.*, 226 NY 185, 123 NE 148, it was held that dominant stockholders may not dissolve a corporation for the purpose of eliminating a minority or "for the purpose of depreciating the value of the corporate property and plaintiff's proportionate interest therein" (pp. 197-198).

New Jersey law is contrary to appellees' contention and citations. *Weisel* v. *Guantanamo Sugar Co.*, 134 N.J.Eq. 271, 35 A 215, aff'd 13 N.J.Eq. 506, 39 A 431, was a corporate recapitalization case in which it was held that a majority of the shareholders may not "destroy the cumulative portion of the contract held by preferred stockholders" (p. 273), that they could not even substitute common stock therefor (p. 274-275), and that merger cases differed only in that there was an alternative right to appraisal and payment in cash (p. 276). *Windhurst* v. *Central Leather Co.*, 101 N.J.Eq. 543, 138 A 772; 105 N.J.Eq. 621, 149 A 36; 107 N.J.Eq. 528, 153 A 402, dismissed on stipulation 296 U.S. 668, involved a failure of plaintiffs to resort to the statutory remedy of appraisal. See also *Clarke* v. *Gold Dust Corporation*, 106 F. 2d 598, 602.

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No. 258

In the Supreme Court of the United States

OCTOBER TERM, 1947

ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, JR., JAMES M. SCHWABACHER, ET AL.,
APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION OF THE UNITED STATES TO AFFIRM

MOTION TO AFFIRM

(Filed August 7, 1947)

(Title of Court and Style of Case Omitted.)

Appellees United States of America and Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from a final decree entered June 16, 1947[1] by a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing a complaint to set aside an order of the Interstate Commerce Commission dated April 1, 1947.[2] Appeal was allowed on July 22, 1947. Copies of the appeal papers were served on the United States and Interstate Commerce Commission on July 23, 1947.

The Commission's order sought to be enjoined by this appeal approved and authorized the merger of the properties and franchises of the Pere

[1] The District Court also rendered an opinion (as yet unreported) on June 12, 1947. Both the final decree and the opinion are appended to Plaintiffs-Appellants' Jurisdictional Statement filed herein.

[2] The Commission's Order and Report, entered in a proceeding entitled Pere Marquette Railway Co. Merger, etc., Finance Docket No. 15228, are appended to Plaintiffs-Appellants' Complaint as Exhibit 1-A.

Marquette Railway Company and the Chesapeake and Ohio Railway Company pursuant to the terms of the Interstate Commerce Act, as amended.[3]

Plaintiffs-Appellants are the owners of 2,100 shares of 5 percent cumulative preferred stock of the Pere Marquette Railway.[4] They intervened in the proceeding before the Commission in opposition to the proposed merger upon the ground that the merger agreement was unfair because it failed to protect their rights and interests as dissenting shareholders, based principally upon a claim to accumulated unpaid dividends. They urged that failure by the Commission to determine their rights apart from the assenting stockholders of the same class was a failure to perform its statutory duty. Plaintiffs-Appellants' complaint confined its attack on the Commission's order to this issue. No claim was made that the findings made in the Commission's report were unsupported by substantial evidence, and the transcript of evidence adduced before the Commission was not introduced in evidence before the District Court.[5]

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[3] The merger was consummated on June 6, 1947, after a motion for a temporary stay of the Commission's Order had been denied by the District Court on June 4, 1947.

[4] This represented 2 percent of the total outstanding stock of this class.

[5] It is settled law that the findings of fact as stated by the Commission in its report must be accepted by the courts in the absence of the entire record of evidence upon which they

The Commission reached the conclusion that "the terms and conditions proposed by the applicant (i. e., the railroads) are just and reasonable", and that "having reached that conclusion, performance of our duty in respect to stockholders is complete, in our opinion, when we make certain that all stockholders of the same class are to be treated alike" (Exhibit 1 (a), p. 32). The Commission went on to say that "Whether dissenting stockholders, as members of a class created by the merger are entitled to better treatment under their charter contract with Pere Marquette is a question not within our province to decide" (ibid). The Commission expressly stated that its holding did not preclude the dissenting stockholders from settling their controversy with the railroads "through negotiation and litigation in the courts" (ibid).

The principal contention made by the appellants is based upon the provisions of the Interstate Commerce Act giving the Commission "exclusive and plenary" authority to approve mergers (section 5) and the assumption of liabilities with respect thereto (section 20 (a)),* on

---

were predicated. *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, 286; *Spiller* v. *A. T. & S. F. Ry. Co.*, 253 U. S. 117, 122, 125; *Louisville & Nashville R. Co.* v. *United States*, 245 U. S. 463, 466; *Louisiana & P. B. Ry. Co.* v. *United States*, 257 U. S. 114, 116; *Tagg Bros.* v. *United States*, 280 U. S. 420, 443.

*The full text of sections 5 (11) and 20 (a) (7) is as follows:

SECTION 5 (11): "The authority conferred by this section shall be exclusive and plenary, and any carrier or corpora-

"such terms and conditions and such modifications as it [the Commission] shall find to be just and reasonable" (section 5 (2) (b)). The

tion participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

SECTION 20 (a) (7): "The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein."

appellants argue that these provisions of the statute prohibit the Commission from remitting the determination of claims of dissenting stockholders against the corporation to other tribunals empowered to deal with them.

We submit that this contention, which was urged upon and rejected by both the Commission and the district court, is without merit. It seems clear that the Commission can properly decline to arbitrate or adjudicate private disputes between dissenting stockholders or between the former and the corporation, where in the judgment of the Commission no considerations of national transportation policy are involved. The statutory criteria which the Commission must consider in passing upon applications by railroads for authority to merge their properties and franchises are contained in section 5 (2) (b) and (c) of the Interstate Commerce Act, 49 U. S. C. section 1, *et seq*:

> (b) * * * If the Commission finds that subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable. * * *.
>
> (c) In passing upon any proposed trans-

> action, under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

The "exclusive and plenary" jurisdiction of the Commission would seem to extend only to the determination of issues involving transportation factors relevant in passing upon proposed mergers. Where the Commission finds that an issue does not involve any such considerations, the statute hardly imposes an inexorable obligation upon the Commission itself to settle such issue.

As stated by Judge Dobie, who delivered the opinion in the district court, the issue which the Commission was called upon to decide was as follows:

> Reduced to its lowest terms, the case of the plaintiffs here seems to be based on the theory that dissenting stockholders (quite apart from any merit in the grounds of dissent) are entitled to preferential treatment more favorable than the treatment accorded to stockholders of the same class (holding the same securities) who did not

> dissent but agreed to the terms of the merger agreement; and, as a consequence, if the Commission does not grant such preferential treatment to the dissenting stockholders, a three-judge district court is justified in setting aside or modifying the order of the Commission.

It is submitted that the Commission discharged its statutory obligations in dealing with the claims presented to it by the appellants. With particular reference to its finding that the terms and conditions proposed were just and reasonable, it carefully analyzed the proposed exchange ratio of Chesapeake & Ohio securities which were to supplant securities of the Pere Marquette. Various bases of value were set up to measure the fairness of the proposed treatment of stockholders in both railroads. As to this the Commission concluded (Exhibit 1A, p. 31):

> Accordingly, considering Pere Marquette's investment according to its books, other property values, the company's history as to earnings, its future prospects, and the market appraisal of its stock, all as set forth above, we find that, as to the stockholders of both parties generally, the proposed ratios of exchange, stock issues, and assumptions of indebtedness are just and reasonable.

The Commission further found:

> * * * performance of our duty in respect to stockholders is complete, in our

> opinion, when we make certain that all stockholders of the same class are to be treated alike.

Thus the Commission undertook to prevent any discrimination against non-assenting minorities. In short, the Commission found that all holders of Pere Marquette preferred stock were a single class for purposes of the Commission's obligation to require "just and reasonable" terms as a condition to its approval of the merger. It further concluded that if dissenting stockholders had individual contractual rights which might be asserted under state law, that was a matter not within the Commission's province to decide. The district court approved this view. It stated:

> As we read the opinion of the Commission it did not attempt to pass upon what rights, if any, dissenting stockholders might have under the laws of the several states. It specifically left Pere Marquette and Chesapeake and Ohio "free to settle controversies with dissenting stockholders through negotiation and litigation in the courts." We adopt a like course.

Contrary to appellants' assertion in their Jurisdiction Statement (p. 11), there is no Commission decision of which we have knowledge which provides for separate treatment for dissenting shareholders as a separate class by attaching conditions to its approval of merger applications.

Here the Commission fully discharged its statutory obligations in approving the merger agree-

ment and property left Pere Marquette and Chesapeake & Ohio "free to settle controversies with dissenting stockholders through negotiation and litigation in the courts".

For the foregoing reasons, it is respectfully submitted that no substantial question is presented by this appeal, and that the judgment of the District Court should be affirmed.

(Sgd.) Philip B. Perlman,
PHILIP B. PERLMAN (V. B.)
Solicitor General.

(Sgd.) Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.

AUGUST 7, 1947

I certify that a copy of the foregoing motion to affirm was served on counsel for all parties of record by mail this 7th day of August, 1947.

(Sgd.) Edward J. Hickey, Jr.,
EDWARD J. HICKEY, Jr.,
Special Assistant to the Attorney General.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 258

ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, JR., JAMES M. SCHWABACHER, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION OF CHESAPEAKE & OHIO RAILWAY COMPANY TO AFFIRM

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JOSEPH C. KAUFFMAN,
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vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION OF CHESAPEAKE & OHIO RAILWAY COMPANY TO AFFIRM JUDGMENT

(Filed July 22nd, 1947)

(Title of Court and Style of Case Omitted)

1

Motion

The Chesapeake and Ohio Railway Company and Alleghany Corporation, pursuant to Rule 12, Paragraph 3, of the Rules of the Supreme Court of the United States,

move that the decree of the District Court be affirmed on the ground that the questions on which the decision of the cause depends have been settled by previous rulings of the Supreme Court and are now so unsubstantial as not to need further argument.

The Proceeding

This is a direct appeal from the final decree entered June 16, 1947, of a specially constituted District Court of three judges, established pursuant to the Urgent Deficiencies Act of October 22, 1913. The decree was entered in accordance with an opinion of June 12, 1947.[1] It dismissed appellants' complaint to set aside an order of the Interstate Commerce Commission.[2] Appeal was allowed on July 22, 1947, and on the same day appeal papers were served on the C. & O. and Alleghany.

The Commission's order of April 1, 1947,[3] was made in a proceeding under Section 5 of the Interstate Commerce Act as amended (49 U. S. C., Sec. 5) that had been instituted on March 8, 1946, by application of C. & O., Alleghany and Pere Marquette Railway Company for authority to merge Pere Marquette into C. & O. The order granted such authority. When appellants, as holders of Pere Marquette Preferred Stock, instituted their action in the District Court to set aside the order, the three companies intervened

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[1] Appended to the Jurisdictional Statement in this appeal.

[2] The order and related Report constitute Ex. 1-A to the Complaint.

[3] On petition for reconsideration by appellants, the effective date of the April 1 order was stayed by the Commission on May 2, 1947, until its further order (Ex. 1-B to Complaint). By an order of the full Commission dated May 29, 1947, the petition for reconsideration was denied and the April 1 order made effective 15 days thereafter (Ex. 1-C to the Complaint). A request of appellants for a further stay was denied by the Commission on May 28, 1947.

as of right [4] and moved that the complaint be dismissed as failing to state a claim upon which relief could be granted because the Commission's action was within its powers, was based on substantial evidence, was in accord with legal standards and was therefore conclusive. After oral argument on June 4, 1947, the United States and the Commission joined in that motion.

On the same day the District Court denied the stay and the case was submitted for final decision on the merits. In accordance with the program announced in oral argument, the two carriers then consummated the merger on June 6, 1947, by proceedings before the Secretary of State of Michigan and the State Corporation Commission of Virginia. As forecast by the decision of June 4, the District Court later handed down its opinion that the complaint was without merit and entered its order appealed from here granting the motion to dismiss.

Statement of the Case

The C. & O. is an interstate railroad between Chesapeake Bay on the east and Toledo and Chicago on the west. The Pere Marquette lines afford a natural northwestward extension from Toledo through Michigan. With Commission approval, the C. & O. has, since 1929, had stock control of Pere Marquette. The merger was an outgrowth of that relationship.

After consideration of extensive evidence on the consequences of the merger with respect to public service, the Commission found the merger "consistent with the public interest" under Section 5(2) and the related issuance of

[4] Judicial Code, Sec. 212-213 (28 U. S. C., Sec. 45a).

securities "compatible with the public interest" under Sec. 20a. This finding is not challenged by appellants.

Turning then to matters of private right in the exercise of its responsibility under Section 5(2) to see that the terms and conditions were "just and reasonable", the Commission considered extensive evidence on that subject. It did so, indeed, with special care in view of C. & O.'s controlling interest in Pere Marquette, for that was deemed to "compel close scrutiny" of the allotments of new securities in the Merger Agreement. In this task the Commission considered all the stipulated terms of the Pere Marquette Preferred Stock, including its dissolution preference and the large amount of accumulated dividends, finding, however, that:

> ". . . the prospects of Pere Marquette stockholders for returns on their investments would be enhanced by merger of their comany into the Chesapeake & Ohio."

The Commission then reviewed the situation of both roads from the point of view of a wide range of investment factors in the light of which these legal terms were to be appraised in determining fair treatment. The nature of this evidence and the conclusion reached are, for present purposes, sufficiently epitomized in the ultimate finding, which likewise is unchallenged:

> "Accordingly, considering the Pere Marquette's investment according to its books, other property values, the company's history as to earnings, its future prospects, and the market appraisal of its stocks, all as set forth above, we find that, as to the stockholders of both parties generally, the proposed ratios of exchange, stock issues, and assumptions of indebtedness are just and reasonable."

Appellants had intervened before the Commission as owners of Pere Marquette Preferred Stock who had not

voted for the merger. Even there, they did not oppose the merger itself. Their main argument was only that the Commission was under a legal duty to provide some special and more favorable treatment for them because they were dissenting from the merger.[5] While this relief was indicated in exploratory rather than explicit terms, their desire was evidently for payment in cash at the rate of par plus accumulated dividends, in all about $175 per share. That claim is now made in terms in the Jurisdictional Statement (Sec. D).

This is in contrast to the treatment which the Commission found "just and reasonable" for all holders of Pere Marquette Preferred (8/10 of a share of C. & O. Preferred Stock and 4/10 of a share of C. & O. Common Stock for each share of Pere Marquette Preferred), treatment which had been accepted by 59% of all outstanding shares of Pere Marquette Preferred and 71% of all voted shares of Pere Marquette Preferred. The Merger Agreement provides this treatment for all holders of Pere Marquette Preferred, whether or not assenting to the merger (Article VII).

In addition the Merger Agreement provides machinery for those wishing to dissent (Article IX). It may be noticed that a proceeding[6] is now pending in the Chancery Court of the City of Richmond, Virginia, the State where C. & O. was incorporated, in which all dissenters may obtain payment in cash of the "fair cash value" of their stock as of the day before the meeting of Pere Marquette stock-

---

[5] This is not a matter of assentors losing their rights by consent, for the Commission must still protect all the Preferred Stock that was not voted either way (17% of the total, only a small part of which was later dissented). The Commission's finding related to all shares of Preferred Stock, whether assenting, dissenting or silent, so the contention is that appellants got something special by dissenting.

[6] *The Chesapeake and Ohio Railway Company* v. *Hylas N. Hastings, et al.*, instituted June 6, 1947.

holders, by appraisal under Virginia law[7] if applicable and otherwise by similar proceedings in equity if appropriate claim therefor shall have been made by August 11, 1947. There is no statutory provision in Michigan, the State where Pere Marquette was incorporated, for appraisal of dissenting stock in railroads, though consolidations of railroads are permitted by Michigan statute in force since before the incorporation of Pere Marquette (Michigan Statutes Annotated, Sec.'s 22.233-4). The Michigan statute requires, however, that a merger agreement be sanctioned by a majority vote of each class of voting stock and further requires that it be approved by the Interstate Commerce Commission. Section 5 of the Interstate Commerce Act makes no provision for appraising the stock of dissenting stockholders but imposes on the Commission the duty to determine that the merger is in the public interest and the terms are "just and reasonable."

The Commission considered appellants' contention in the light of the whole record. The Commission was apprehensive that State laws permitting money judgments for dissenting stockholders upon appraisal or other proceedings might obstruct the accomplishment of Federal policy for unifications, for in its view it was

> "difficult to conceive of a restraint or limitation on contemplated unifications better serving to frustrate the national transportation policy than provisions of State laws for compensation of dissenting stockholders on specified bases."

The Commission nevertheless refrained from any effort to preclude proceedings of that kind in local courts. On the other hand, it was unwilling to enlarge any appraisal rights otherwise existing under State law. In fact, it left those rights as they were under local law, for en-

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[7] Virginia Code of 1919, as amended, Sec. 3822-a.

forcement in such manner, and with such results, as local law might provide. The measure of its duty, it concluded, was Federal law as proclaimed in Section 5(2). Under that provision, it was the Commission's duty to see that the terms are "just and reasonable", that is, to see that the allotments of new securities represent the fair equivalent of the old in all the circumstances. But it need go no further. So, having found, after "close scrutiny", that the terms and conditions are "just and reasonable", it said:

> ". . . performance of our duty in respect to stockholders is complete, in our opinion, when we make certain that all stockholders of the same class are to be treated alike."

The Commission was thus vigilant to prevent any discrimination against non-assenting minorities, and insisted that the treatment it deemed "just and reasonable" should be available for all members of the class, as in fact the Merger Agreement proposed. But it did not think that members of that class could, for purpose of Federal law, remove themselves to a special class or entitle themselves to special treatment by the mere fact of dissenting. If any such claim could be asserted under State law, it concluded, it was to be enforced in State tribunals alone, saying:

> Whether *dissenting* stockholders, as members of a *class* created by the merger, are entitled to better treatment under their charter contract with the Pere Marquette is a question not within our province to decide, *Otis & Co.* v. *Pennsylvania R. Co.*, 61 Fed. Supp. 905" (Italics added).

In summary, it was the clear view of the Commission that all holders of Pere Marquette Preferred Stock were a single class for purposes of Federal law and the treatment

accorded them must be "just and reasonable," and further that, if any dissenting stockholders as such should constitute a separate class within the meaning of any State law, any rights accorded them in that capacity by State law might still be enforced in State tribunals but could be enforced only there.

The District Court approved this view. It said:

> "Reduced to its lowest terms, the case of the plaintiffs here seems to be based on the theory that dissenting stockholders (quite apart from any merit in the grounds of dissent) are entitled to preferential treatment, more favorable than the treatment accorded to stockholders of the same class (holding the same securities) who did not dissent but agreed to the conditions in the merger agreement; and, as a consequence, if the Commission does not grant such preferential treatment to the dissenting stockholders, a three-judge district court is justified in setting aside or modifying the order of the Commission. We know of no case sustaining this (to us) novel principle. We think, further, this theory has no support in practical economics or in commercial ethics.
>
> "As we read the opinion of the Commission, it did not attempt to pass upon what rights, if any, dissenting stockholders might have under the laws of the several states. It specifically left Pere Marquette and Chesapeake and Ohio 'free to settle controversies with dissenting stockholders through negotiation and litigation in the courts.' We adopt a like course. Nothing in our opinion is to be interpreted as in any way determining, affecting or prejudicing these rights, whatever they may be."

Appellants repeat the same contention here. As made clear in the Jurisdictional Statement (sec. D., second paragraph), it is that appellants, by their mere act of dissenting from the merger, entitled themselves to receive an amount in cash or its equivalent equal to the par value of

their stock plus accumulated dividends thereon because the Pere Marquette charter prescribes that amount as the preferential claim of the Preferred Stock "In the event of any liquidation, dissolution or winding up, whether voluntary or involuntary. . . . ." Appellants accordingly say that the Commission was required as a matter of law to condition its approval of the merger on payment of such a sum to them.

4

The Question

Since appellants did not offer in evidence before the District Court the record made before the Commission, they are precluded from attacking the Commission's findings, which must be accepted as true.[3]

It follows that the only question presented in this appeal is whether the act of dissent from a railroad merger requires the Commission as a matter of law to give the dissenting stockholder different treatment from the rest of his class, either *(i)* by awarding cash in a given amount instead of a "just and reasonable" award of new securities, or *(ii)* by awarding cash or its immediate equivalent in the full amount of the stipulated dissolution preference though admittedly exceeding "just and reasonable" treatment.

5

Argument

Both elements of this question have been settled by previous rulings of this Court and merit no further consideration.

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[3] *Louisiana & P. R. R.* v. *U. S.*, 257 U. S. 114, 116 (1921); *Mississippi Valley Barge Line Company* v. *U. S.*, 292 U. S. 282, 286 (1934).

(a) The Question of Cash

No holder of old securities, even of bonds or debentures, has an unconditional right under Federal law to payment in cash upon a readjustment of interests in the enterprise except where the quality of his right in all the facts as appraised by the administrative agency makes that necessary for fair and equitable treatment. It is within the power of the administrative agency to satisfy all his old rights by a "fair and equitable" award of new securities, even of stock, both in case of insolvent companies under the Bankruptcy Act (*Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R.*, 318 U. S. 523, 563-4, 1943) and in case of solvent companies under the Public Utility Holding Company Act (*In Re Standard Gas and Electric Co.*, 151 F. 2d 326, 329, C. C. A. 3, 1945, *cert. den.*, 327 U. S. 796, 1946). *A fortiori* it is within the power of the Commission to satisfy the rights of old shares of *stock* by a "just and reasonable" award of new stock. The premise that the particular award of new securities in this case is "just and reasonable", unassailable here as pointed out above, precludes any right to require the Commission to provide payment in cash.

The only other circumstance in appellants' claim is that they dissented from the merger. But their state of mind is not a pertinent circumstance in appraising the Commission's legal duty. The controlling test, for purposes of "just and reasonable" treatment, was the worth of their old security in all the circumstances. Neither the attributes of their old securities, nor their resulting rights, could be enlarged by taking thought, whether for the merger or in opposition to it. This follows *a fortiori* from the holding in *R.F.C.* v. *Denver and Rio Grande Western R.*, 328 U. S. 495, 535 (1946), where it was held, though under a provision

of the Bankruptcy Act contemplating a vote by security holders, that:

> "If a plan gives fair and equitable treatment to dissenters, the elements which make the plan fair and equitable cannot be the basis for a reasonably justified rejection."

In a word, dissent from a merger does not in itself establish dissenters as a separate class and they have no additional rights because of their individual wishes. This is, indeed, a longstanding principle:

> ". . . the classification should in nowise depend upon the nature of the claimant or his interest in the sense of his bias or leanings, but only upon the nature of the claim." (*J. P. Morgan & Co.* v. *Missouri Pacific R.*, 85 F. 2d 351, 352, C. C. A. 8, 1936, *cert. den.*, 299 U. S. 604, 1937, arising under Section 77 of the Bankruptcy Act.)

Any other rule would, as the Commission recognized, gravely obstruct the accomplishment of the Federal policy for unification of interstate railroads on "just and reasonable" terms.[9]

Had the Commission purported to preclude the assertion of any right to cash payment under State law, an arguable question might have been presented. But the Commission left any such rights available to appellants by appropriate proceedings under State law. The Commission clearly had no duty to enforce State law itself, and no Federal law re-

[9] All previous Commission decisions cited in the Jurisdictional Statement (footnote 9) deal with purchases of a controlling stock interest where the Commission was solicitous to require an offer on the same terms to minority holders, fearing the possibilities of oppression by the new controlling interest. The only policy those decisions make for is equality of opportunity. That policy is realized in full here, for the Merger Agreement assured identical opportunities to all.

quires it to abdicate the exercise of its administrative judgment and abstain from "just and reasonable" treatment for the sole purpose of awarding cash to those who prefer to have it.

The assertion that the Commission was governed by any legal duty to make such an award, or to prescribe means for making it, presents no arguable question.

(*b*) *The Question of Dissolution Preference*

A stipulated dissolution preference is, like any other attribute of a security, one of the factors to be considered in determining fair treatment. But it is no more. Even where a dissolution in fact occurs under State law, a Federal administrative agency empowered to devise a "fair and equitable" plan is not, by that circumstance alone, under a legal duty to award the full amount of the stipulated dissolution preference (*Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 1945). *A fortiori* this is true where no dissolution in fact occurs under State law. There was none here:

> "Whether a merger results in the dissolution of th constituent corporations depends upon the terms and intent of the statute involved. . . .
>
> "It is well settled in this State that the merger of two corporations does not end the existence of either. . . ." (*Adams* v. *U. S. Distributing Corp.*, 184 Va. 134, 150, 34 S. E. 2d 244, 251, 1945, *cert. den.*, 327 U. S. 788, 1946)
>
> . . . . . .
>
> "Those who become stockholders in a private corporation become such upon the agreement and contract that their investment therein may be handled subject to the exercise of any and all powers conferred upon the corporation by law." (*Voigt* v. *Remick*, 260 Mich. 198, 244 N. W. 446, 449, 1932, *cert. den.*, 289 U. S. 756, 1933, referring to the power to consolidate.)

In the alternative, taking the question whether the charter provision for a dissolution preference applies under Section 5 of the Interstate Commerce Act to be a matter of Federal law, like the applicability of similar provisions under the Public Utility Holding Company Act (*Otis & Co.* v. *S. E. C.*, at p. 636), it is equally settled that there was no dissolution here:

> ". . . merger . . . would avoid . . . liquidation" (*id.*, at p. 631 and v. pp. 637-8).

In either event, accordingly, the assertion that the Commission was under an unconditional legal duty to award the full amount of the stipulated dissolution preference presents no arguable question.

Conclusion

We ask, therefore, that the judgment of the District Court be affirmed.

Dated July 31, 1947.

Respectfully submitted,

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

REPLY OF THE CHESAPEAKE AND OHIO RAILWAY COMPANY

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Dated September 9, 1947.

REPLY OF THE CHESAPEAKE AND OHIO RAILWAY COMPANY

As our responsibility to the Court outranks our responsibility to the client, a fair statement of the case is our first concern. By that token, personal epithet, especially when without basis, has no bearing on the issues. We ignore, therefore, as both unfounded and irrelevant, the accusations in Appellants' Brief in Opposition to Motions to Affirm (even the last sentence on page 8).

The merits of the case, we believe, are presented fairly and distinctly in our Motion to Affirm. The basic point of Appellants' reply brief, that we misrepresent the issue, is sufficiently answered by the circumstance that our formulation of the issue (Motion to Affirm, page 9) is in effect the same as that made by the court below (Motion to Affirm, page 8). If this is not the issue Appellants have in mind, they state no other, an additional reason for summary affirmance.

Dated September 9, 1947.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 258

ALBERT E. SCHWABACHER, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE CHESAPEAKE AND OHIO RAILWAY COMPANY, APPELLEE

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Dated December 26, 1947.

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INTRODUCTION

This case involves an attack on an order of the Interstate Commerce Commission authorizing a merger of Pere Marquette Railway Company into The Chesapeake and Ohio Railway Company. A map of the two roads appears at R. 132A.

The attack is made by appellants as holders of Pere Marquette Preferred Stock who had opposed the application before the Commission. The District Court of three Judges below denied a stay on June 4, 1947, and later dismissed the complaint. The merger was consummated on June 6, 1947. Appellants later took this appeal. They disclaimed below any attack on the merger as such or on its conformity with the public interest, seeking only an improvement in the terms of their treatment.

Pere Marquette and C&O intervened as of right below, together with Alleghany Corporation, holding over 6% of the Common Stock of C&O. The latter, as the surviving corporation in the merger, and Alleghany are here as appellees to submit that the appeal is without merit.

OPINIONS BELOW

The opinion of the District Court of three Judges (R. 254) is reported in 72 F. Supp. 560.

The Report of the Commission (R. 5) is reported in 267 I. C. C. 207.

JURISDICTION

The judgment of the court below was entered on June 16, 1947 (R. 257). The petition for appeal was filed on July 22, 1947 (R. 257). Probable jurisdiction was noted on October 13, 1947 (R. 267).

The jurisdiction of this Court rests on Section 210 of the Judicial Code as amended by the Urgent Deficiencies Appropriation Act of 1913 (28 U. S. C., §47a) and Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C., §345).

QUESTIONS PRESENTED

The only issue presented to the court below was whether the Commission's order should be set aside on an allegation that "Failure to include protection for plaintiffs *as dissenting stockholders,* AS A DISTINCT CLASS CREATED BY THE MERGER, is contrary to law. . ." (Complaint, R. 3, emphasis supplied) The court below answered that question in the negative, holding, in effect, that all holders of the same issue of stock are in the same class, whether assenting, non-assenting or dissenting, and the Commission has no duty to award better treatment because of dissent.

The issue is transformed by appellants here (Brief p. 13) into an assertion that the Commission's order was beyond its power, not for alleged failure to "include protection" for dissenters as a new class "*created* by the merger", as below, but for asserted failure to "include protection" for Preferred stockholders as an old class all of whose rights were vested *before* the merger, though appellants claim (Brief p. 20) that dissenters are the only members of the class still entitled to complain, their theory being that votes for the merger worked a waiver of right by others. Thus they spoke below of rights resulting from dissent, while here they speak of rights resulting from stock ownership irrespective of dissent.

Appellants' case on this new approach is based wholly on a crucial misconception of what the Commission did. Their assertion is that the Commission held itself without power

to evaluate the stipulated priorities of the Pere Marquette Preferred in all the facts for the purpose of determining just and reasonable treatment (Brief pp. 2, 6, 13, 20). From this premise a number of derivative questions and anomalies are then drawn. But, as plainly shown by the Commission's Report, it recognized its dominant statutory responsibility to assure just and reasonable treatment for all security holders and addressed itself to the patient and thorough discharge of that duty. The only question it disclaimed power to decide was whether dissenters might, or might not, be entitled to procure better than just and reasonable treatment by litigation in State tribunals, and on that question it did nothing.

So the only issues, even on appellants' new approach, are, as we see them, two:

1. Was it within the power of the Commission, in approving a railway merger under a statute vesting it with "exclusive and plenary" authority, to fix just and reasonable treatment for all Preferred stockholders (treated as a single class, however voting) through an administrative evaluation of all their stipulated priorities in the light of all the pertinent facts, or was it required as a matter of law to treat the merger like a liquidation and thus give controlling effect to the stipulated liquidation preference so as to award cash or its immediate equivalent in the full amount of par plus accumulated dividends?

We seek to answer this question by the proposition (I below) that the Commission did its full duty to assure just and reasonable treatment.

2. Is a Commission determination of just and reasonable treatment, otherwise within its power, invalidated by a mere expectation that alternative recoveries might possibly be

obtainable under some surviving State procedure, where this expectation was not embodied in any action of the Commission, whether enabling or restrictive in character, and in no way influenced its determination?

We seek to answer this question by the proposition (II below) that possible recoveries by alternative procedure under State law have no place in any issue here.

The appeal is to be considered in the light of the circumstance that appellants have not brought here the record underlying Commission action and thus may not be heard to urge that it was insufficient to support the Commission's findings.[1] We deny any concession, asserted in Appellants' Brief (p. 10), that the issues are other than as stated above, and submit that the references cited for that assertion disprove it.

STATUTE INVOLVED

Sections 5 and 20a of the Interstate Commerce Act, as amended, giving the Commission authority over mergers and the issuance of securities, respectively, are, so far as pertinent here, set out in Appendix A.

Enabling legislation of the States, though we think it sufficiently summarized in 4 next below, is appended in full text if further reference be desired (Michigan in Appendix B, Virginia in Appendix C).

STATEMENT

1.

The Two Roads

C&O is a major road between Chesapeake Bay on the east and Toledo and Chicago on the west. Its principal busi-

[1] *Louisiana & P. B. R.* v. *U. S.*, 257 U. S. 114, 116 (1921); *Mississippi Valley Barge Line Co.* v. *U. S.*, 292 U. S. 282, 286 (1934).

ness is carrying coal. It is, indeed, the largest bituminous coal originating road in the country (R. 11). Pere Marquette was a natural complement, both by location, in that it provided a northerly extension of line from Toledo, Ohio, and La Crosse, Indiana, through the peninsula of Michigan, and also by traffic, for its principal business was to serve coal consuming industries (R. 13).

As early as 1929 the Commission found that the association of the two roads was in the public interest and authorized the acquisition of control by C&O (R. 11). Actual experience under coordinated operation after that time gave the Commission a broader basis of judgment (R. 14) on which to confirm its approval in the public interest (R. 37). Since no attack is made on its order in that respect (R. 197, 249, 254), we need not enter on the additional advantages expected from complete unification, though they may be indicated, in a word, as primarily the creation of a strong, uniform and efficient carrier throughout the whole territory, with incidental benefits by further reduction of operating expenses and improvement of the credit base for Pere Marquette bonds (R. 9-15, 36-39, 61).

2.

The Capitalization of the Two Roads

The funded debt of C&O, some 205 million dollars of bonds and equipment obligations (R. 18, 160A), is unaffected by the merger and needs no further mention. The only other securities of C&O at the time of the merger were something less than 8 million shares of Common Stock (R. 160A), with a par value of $25 per share (R. 18) but selling, at that time and now, within a range of some 10 points on either side of twice that amount (R. 42, 171). This stock is likewise unchanged by the merger. Dividends have been

paid in every year of this century except 1915 (R. 45). Continuation of the present dividend rate of $3.50 per share is a reasonable expectation (R. 49).

Funded debt of Pere Marquette consisted of 56 million dollars of publicly held First Mortgage Bonds and equipment obligations (R. 35, 160B). Under the merger it was assumed in its entirety by C&O and was, accordingly, unaffected. The only securities changed by the merger were the shares of Pere Marquette stock. There were 3 classes:

(*a*) Prior Preference Stock (111,999 shares outstanding) of the par value of $100 per share and entitled to one vote per share on all matters (R. 18). The dividend rate is 5% and dividends are fully cumulative (R. 18). Dividends are in arrears since November 1, 1938 (a total of $36.25 a share as of February 1, 1946, R. 49). The redemption price, and the stated liquidation preference, are par plus accumulated dividends (R. 50).

(*b*) Preferred Stock (124,288 shares outstanding) of the par value of $100 per share and entitled to one vote per share on all matters (R. 18). The dividend rate is 5% and dividends are fully cumulative (R. 18). Dividends are in arrears since August 1, 1931 (a total of $72.50 a share as of February 1, 1946, R. 49[*]). The redemption price, and the stated liquidation preference, are par plus accumulated dividends (R. 50).

(*c*) Common Stock (450,448 shares outstanding), also of the par value of $100 per share and entitled to one vote per share (R. 18).

The Pere Marquette charter, though not in the record before this Court, is on file with the Commission. (Finance

[*] $75, being the accrual to August 1, 1946, is occasionally used in the Report, *e. g.*, R. 51. Only $30 had been earned (R. 51).

Docket 11228). Since appellants stress an argument of charter right, we supply, for convenience, the text of Article IV (being the whole of the stock description) as Appendix D. We refer for brevity, to rights created by the charter as stipulated priorities", though of course, there is no stipulation except the charter.

The C&O owned at the time of the merger 13,950 shares of Pere Marquette Preferred and 313,900 shares of Pere Marquette Common (R. 163). This was 11% and 70% of the respective issues (R. 9). Many principal officers held the same position in both companies (R. 14). For this reason the Commission held that the terms and conditions of the Merger Agreement "compel close scrutiny" (R. 54), and in its decision, as pointed out more fully below, "we [of the Commission] have undertaken to do this" (R. 54). To anticipate, we may add that a majority approval of each class of Pere Marquette stock was also a condition to the merger becoming effective (3-5 below).

3.

The Merger Agreement

When the earnings and interest rates of war time (R. 40) permitted a large reduction in Pere Marquette fixed charges by a refunding in 1945, consideration of a possible merger was undertaken (R. 15). A meeting of minds between the two boards of directors occurred on essential terms on December 4, 1945 (R. 16). These were embodied in the formal terms of the Merger Agreement (R. 101) and it was approved by both boards of directors on February 19, 1946 (R. 16). It provides the following treatment for Pere Marquette stock of the 3 classes (including accumulated divi-

dends and applying also to shares held in the treasury of C&O):

Each share of Pere Marquette	*is converted into the following shares of C&O*	
	New Preferred	*Common*
Prior Preference Stock	1	1/3
Preferred Stock	8/10	4/10
Common Stock		1/2

The new C&O preferred stock created by the Merger Agreement is the initial series of a new class of Preferred Stock, designated 3½% Convertible Preferred Stock (the New Preferred). It bears fully cumulative preferential dividends at that rate, has a par value of $100 a share and is entitled to one vote on all matters (R. 106, 108, 112 and 114). Each share of the New Preferred is convertible at any time, at the option of the holder, into 1.6 shares of Common Stock, with protective provisions to assure the same proportionate conversion ratio despite intervening changes of capitalization (R. 114). The New Preferred is redeemable (but not earlier than November 1, 1950) at $105 per share (R. 120) together with a sum equal to all dividends accrued or in arrears (R. 110). The stated dissolution preference is the same (R. 109, 114).[3] In addition, the New Preferred, together with any future series of that class, is entitled to the benefits of a Retirement Fund (R. 112), under which 5% of residuary earnings in each year, as defined (but not more than enough to produce a balance of 1 million dollars in the fund), are to be set aside for the purchase of such stock.

The allocations were made, not as of a fixed calendar date,

[3]The $100 figure at Appellants' Brief, p. 7, n. 1 is erroneous.

but as of the Merger Date (R. 125-26). It was defined to be, and the merger was declared to become effective on, the date (after stipulated corporate authorization, action by the Commission and filing with the proper Michigan authority) when the Merger Agreement should, by order of the State Corporation Commission of Virginia, be admitted to record in its office (R. 130-31). The stipulated corporate authorization was 98% assent by each of the 4 classes of stock, or any smaller percentage adequate under State law "if the board of directors of each of the parties hereto shall determine that it is practicable and desirable and in the interests of such party to consummate the merger with the votes and assents then obtained . . ." (R. 130). The amount of assents (above State law requirements) was significant as limiting potential liabilities to dissenters (R. 98).

Dissenters, as well as all other stockholders (whether assenting to the plan or taking no action at all), were to be entitled to the allocations stated above (R. 126). It was also provided in the Merger Agreement that any stockholder not voting for the merger and desiring to dissent might (and, if so provided at the time by Virginia law, should) serve notice of dissent on specified corporate officers "at any time within three months after the date of the meeting of the stockholders of his corporation. . ." (R. 131). The Proxy Statement (R. 79) included the full text of the Merger Agreement (R. 101) and the full text of Sections 3822-a and 3822-b of the Virginia Code with respect to dissenters' rights (R. 175). The latter section, by then enacted, required the notice of dissent prescribed in the Merger Agreement. The Proxy Statement further pointed out that "The statutes of Michigan contain no provision dealing with this subject." (R. 99)

4.

State Laws

Statutes, both of Virginia, where C&O was incorporated (R. 11), and Michigan, where Pere Marquette was incorporated (R. 12), authorize the merger. Both these statutes may be sufficiently put by summary, for nothing turns here on their details.[4]

Virginia law provides, and has for many years (Code of 1919, as amended, Section 3821, Appendix C) that:

> ". . . any corporation . . . organized . . . under any law or laws of this State . . . may merge or consolidate in the manner prescribed in Section 3822 of the Code as amended into a single corporation with any other corporation organized for the purpose of carrying on the same or a similar business or for the same or similar purposes under the laws of this or any other state . . ."

Section 3822 prescribes the requisite corporate procedure as being (*i*) entry by the boards of directors of the two companies into a merger agreement providing for designated subjects, (*ii*) adoption of the agreement at stockholders' meetings of each company by "a majority of all the votes cast at each of such meetings" and (*iii*) the entry of an order by the Virginia Commission granting a certificate of merger and directing its recordation. Sections 3222-a and 3222-b (R. 175) provide procedure for any stockholder who has not assented to the merger and who wishes to dissent. In brief, the procedure is (*i*) service of notice of dissent in the manner and time designated in the Merger Agreement here involved and (*ii*) appraisal of "the fair cash value" of his stock as of the day before the stockholders' meeting, to

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[4]Their full text is supplied, however, in Appendices B and C.

be made by a Virginia court, in proceedings initiated by the dissenter or by the company. It has not been judicially determined whether these provisions apply to stockholders of a foreign corporation merged into a Virginia corporation. That question is pending for determination by the Chancery Court of the City of Richmond in appraisal proceedings instituted by the C&O on June 6, 1947,[5] but suspended pending decision of this appeal.

Michigan statutes have also, for many years (since 1855), authorized consolidations of railroads, including consolidations of domestic corporations with foreign corporations. They have never made any provision for appraisal of dissenting shares. Specifically, consolidations were authorized, without provision for dissenters, by the Michigan Railroad, Bridge and Tunnel Companies Act of 1873, well before the incorporation of Pere Marquette in 1917. The prescribed procedure is (*i*) entry by the boards of directors into a merger agreement providing for designated subjects, (*ii*) sanction of the agreement "by a majority vote of the stockholders of each class of stock having voting powers" and (*iii*) filing of the agreement with a designated Michigan authority. The only significant amendment, that of 1946, was to enlarge the technical form by permitting mergers as well as consolidations where foreign corporations are involved.[6]

Except in case of business corporations after 1931 (when an amendment to the 1921 General Corporation Act conferred the appraisal privilege in respect of corporations governed by that Act) no court in Michigan, whether State or

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[5] *The Chesapeake and Ohio Railway Company* v. *Hylas N. Hastings, et al.* A petition by appellants here for removal to the District Court of the United States for the Eastern District of Virginia was denied, as not presenting a separable controversy, by the Chancery Court on July 24, 1947, and by the District Court on October 6, 1947.

[6] The full text as amended appears in Appendix B.

Federal, has, we believe, permitted an appraisal or other cash recovery in case of any merger or consolidation accomplished through procedure authorized by statute. On the contrary, we believe the Michigan doctrine to be (except only for business corporations after 1931) that the possibilities of merger and consolidation are a term of the contract to which the purchaser of stock agrees and he has, accordingly, no right to be bought out in such event through any form of appraisal or other procedure.[7] This is the more readily understandable in view of the fact that the traditional pattern of railway growth, so strongly supported by the public interest, is by unifications, and in view of the further circumstance that the Michigan act now permits unifications only after administrative authorization by the Interstate Commerce Commission.

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[7] *Kirby* v. *Saginaw Hotels Co.*, 253 Mich. 308, 235 N. W. 153 (1931), citing *Mayfield* v. *Alton Railway Gas and Electric Co.*, 198 Ill. 528, 65 N. E. 100 (1902); *Wells* v. *Rodgers*, 60 Mich. 525, 27 N. W. 671 (1886); *Detroit, Lansing and Lake Michigan R.* v. *Starnes*, 38 Mich. 698 (1878); *Monroe* v. *Fort Wayne, Jackson and Saginaw R.*, 28 Mich. 271 (1873); *Swartwout* v. *Michigan Airline R.*, 24 Mich. 389 (1872). The last 4 of these cases permit a consolidated corporation to recover unpaid subscriptions to stock of the constituent companies, and thus mean that a stockholder in a constituent corporation is not entitled to be bought out after a consolidation. Far from supporting appellants' case, *Voigt* v. *Remick*, 260 Mich. 198, 244 N. W. 446, 449 (1932), *cert. den.*, 289 U. S. 756 (1933, Appellants' Brief, p. 14, n. 5) actually holds that purchasers of stock agree to the disposition of their investment by "all powers conferred upon the corporation by law", citing the power to consolidate. *Sutton* v. *Globe Knitting Works*, 276 Mich. 200, 267 N. W. 815 (1936, Brief, p. 9, n. 3) deals only with an attempted elimination, by charter amendment, of an unconditional promise to redeem on a day certain.

5.

Stockholder Action

At stockholder meetings in April and May, 1946, the merger was accepted by more than the statutory vote of each company (R. 17). The details follow:

Class of stock	*Accepted by the following percentages of*	
	Shares Outstanding	*Shares Voted*
Pere Marquette Prior Preference	71.33	93.11
Pere Marquette Preferred	58.91	70.91
Pere Marquette Common	82.37	93.06
C&O Common	59.27	98.87

All unassented shares were potential dissenters. But, of course, many of these holders were merely silent. In fact, relatively few dissents were filed within the 3 months' period provided by the Merger Agreement and the Virginia statute. Since that time most of the Pere Marquette stock has been surrendered in conversion, so that the shares still outstanding, whether assenting, non-assenting or dissenting, are about the same as the number seasonably dissented.* The details follow:

Class	*% seasonably dissented*	*Still outstanding*	
		%	*No. of shares*
Pere Marquette Prior Preference	1	1.75	1,958
Pere Marquette Preferred	10.15	8.40	10,419
Pere Marquette Common	4.46	4.60	20,765
C&O Common	*		

*100 shares only.

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*The dissents are shown at R. 56, n. 14. The shares surrendered in conversion are not of record here but, being shown in an official report of C&O on record with the Commission, may be judicially noticed (*Insurance Group Committee* v. *Denver & Rio Grande Western R.*, 329 U. S. 607, 616-18, 1947). The whole report is reproduced, for convenience, as Appendix E.

6.

The Commission's Action

(*a*) *Procedure*

Application was filed with the Commission on March 8, 1946, for requisite authorization under the Interstate Commerce Act, chiefly Sections 5 and 20a (R. 7-8). Certain Pere Marquette stockholders intervened (R. 9). A hearing was held (R. 9). A proposed report was then issued (R. 7 and 9). Appellants then intervened (R. 9). After oral argument (R. 56), decision was rendered by Division 4 on April 1, 1947 (R. 5), about one year after the application was filed. On petition by appellants for rehearing, the effective date of the order was at first stayed (R. 67) and then, rehearing being denied by the full Commission, fixed at 15 days after May 20 (R. 68). Appellants then asked the Commission for a further stay (R. 69) and it was denied.

(*b*) *The Evidence Considered*

The sufficiency of the evidence to support the Commission's findings is not an issue here (p. 4 above). But for the purpose of showing the scope and nature of the Commission's consideration, we mention the main lines of evidence that it considered, looking for this purpose only to the findings of fact in the Report. The implications from some of these findings appear in the Argument below.

The Commission began with an analysis of the intercorporate relationships among the three applicants (R. 9-10). Taking up then the C&O system, the Commission traced its corporate history, its mileage, the territory served and the business carried (R. 11). Similar information was reviewed for the Pere Marquette system (R. 12-13). The Commission then looked at the history of the affiliation between the C&O and Pere Marquette, including the benefits derived

from coördinated management since 1929 (R. 13-15). It then turned to the negotiation of the Merger Agreement, the applicable provisions of local law and the figures on stockholder vote (R. 15-17). The present financial structures of both roads were then examined (R. 17-18) and the Merger Agreement described at length (R. 18-36).

Turning to the effect of the merger, the Commission examined a *pro forma* balance sheet reflecting the consummation of the merger (R. 36) and probed the consequences for various significant factors of the public interest (R. 36-39). It then took up the fairness of the terms. Though considering market prices of securities, as evidential of prospective earnings and investment value (R. 41-43), the Commission felt it should not confine its examination so narrowly. It analyzed the business history of both roads, their reported earnings in various informative periods, the relative amounts and trends of these earnings and the results of combining them in a single income account (R. 43-46). Historical earnings were then applied to the new capitalization, and the outlook for earnings and dividends after the merger was surveyed (R. 48-50). The Commission then recited the redemption terms and the stated liquidation preference of the Prior Preference Stock and the Preferred Stock and concluded with a summary of the dividend record in the past and a finding that their prospects for a return in the future would be improved by the merger (R. 50-52). Though prospective earnings were evidently taken as the primary criterion, the Commission looked also at book value and at rate-making value plus net additions (R. 46-47). In conclusion, the Commission found the proposed treatment "just and reasonable" (R. 52), satisfied itself that the maximum possible cash payment to dissenters would not impair the ability of the road to perform its public functions (R. 55-56), and reviewed miscellaneous matters not significant here (R. 56-61).

(c) *The Commission's Reasoning*

The Commission clearly recognized two primary responsibilities, first to see that the public interest would be served by unification on the terms proposed, and second to see that the terms were just and reasonable to security holders.

Thus on the latter point it declared that:

> ". . . we are expressly enjoined by the statute to make specific findings with respect to the terms and conditions of transactions proposed under section 5(2) . . ." (R. 40)

It faced this issue on its own merits, uninfluenced by overwhelming stockholder approval and limited opposition, for this, the Commission said, "does not affect the issue" (R. 40) and it must discharge its full statutory task "if not a single share be in dissent" (R. 40).

Refusing the aid of short cuts in the field of reasonableness, the Commission went to the root of the problem in its traditional way, saying

> "In the discharge of our duty under the statute to find whether the terms and conditions proposed for the merger are just and reasonable, we cannot confine our inquiry to market opinion, but must give consideration to all relevant elements of value." (R. 43)

It made, accordingly, a comprehensive review of all the factors mentioned in (*b*) next above, and on this broad base came to its ultimate conclusion that:

> "Accordingly, considering the Pere Marquette's investment according to its books, other property values, the company's history as to earnings, its future prospects, and the market appraisal of its stocks, all as set forth above, we find that, as to the stockholders of both

parties generally, the proposed ratios of exchange, stock issues, and assumptions of indebtedness are just and reasonable." (R. 52)

By this examination and finding, the Commission's duty on the question of reasonableness was discharged. It then turned to a consideration of alternative remedies urged to be available under State law, particularly the asserted rights to appraisal in statutory proceedings or cash payment in equity proceedings. This is the point where appellants slip into their crucial misconception of Commission action. The pertinent discussion, placed after the whole review of fairness and the ultimate conclusion on it, is entitled "Jurisdiction" (R. 52). It deals with the opposing arguments of the several parties on asserted alternative remedies under State law. On the one hand, appellants contended that by contract under Michigan law the holders of Pere Marquette Preferred were entitled to better treatment and the Commission should give it to them or, at least, not foreclose resort by them to State tribunals. On the other hand, the C&O, desiring, as the Commission found, to "deal fairly" (R. 54) and mindful of the doubts and limitations in appraisal rights under relevant local laws (p. 10 above), voluntarily proposed that the Commission require it to pay any dissenting stockholder who might be so disposed in such amount as might be found by the Chancery Court of the City of Richmond, Virginia, following, consensually, the procedure of the appraisal statute.

The Commission, however, held firmly to the Federal Act as measuring its duty in the premises. That was, it said, to satisfy itself that the proposed treatment is just and reasonable and that all stockholders in the same class are to receive it (R. 54). But this, it thought, was the extent of its duty, and it should not attempt any action to enlarge or restrict

any remedies possibly available under State law, for the question whether dissenting stockholders "are entitled to better treatment" than the just and reasonable terms contemplated by the Act is a matter for the courts, and thus "not within our province to decide" (R. 54).[9] What the Commission so disclaimed, we believe, was jurisdiction to decide what alternative remedies, if any, might prove available under State law and what might be recovered through them if available. The words can not, we believe, be read (Appellants' Brief, p. 20) as disclaiming jurisdiction to determine the just and reasonable equivalent for the stated priorities of Pere Marquette Preferred as evaluated on all the pertinent facts, for that was a task the Commission had just done in full. So, after satisfying itself that the maximum cash burden that might conceivably be imposed on the C&O in any such State litigation would "not involve a burden of excessive expenditure" (R. 50), the Commission granted full authorization for the merger.

7.

Action of the Court Below

On denial of a stay by the Commission, appellants filed their Complaint (R. 1) in a District Court of three Judges, pursuant to the Urgent Deficiencies Appropriation Act of 1913 (R. 1). Apart from introductory and argumentative recitals, it makes only one operative allegation:

> "Failure to include protection for plaintiffs *as dissenting shareholders, as a distinct class created by the*

[9] It is the ordinary rule that an administrative agency enforces the act laid down for it by the Congress, leaving any questions of constitutionality to the courts. *Panitz* v. *District of Columbia*, 112 F. 2d 39, 42 (App. D. C., 1940); *Todd* v. *S. E. C.*, 137 F. 2d 475, 478 (C. C. A. 6, 1943); *Engineers Public Service Co.* v. *S. E. C.*, 138 F. 2d 936, 951-53 (App. D. C., 1943), app. dism., 332 U. S. No. 2, I (Oct. 20, 1947).

merger, is contrary to law and a direct violation of the Commission's statutory duty to impose just and reasonable conditions for the protection of all interests concerned" (R. 3, italics added).[10]

C&O, Pere Marquette and Alleghany intervened (R. 181-83) and filed a motion to dismiss (R. 182), in which the United States and the Commission later joined (R. 253). Other stockholders, holding large amounts of Pere Marquette stock of all classes, intervened in vigorous support of the Commission's action (R. 183-92).

After full argument (R. 193-251), the court denied a stay, and received the case for disposition on the merits, upon inclusion, by stipulation (R. 252), of the Proxy Statement (R. 79) as additional evidence.

By later opinion (R. 254) the court granted the motion to dismiss. Broadly summarized, this was on the basis that (*i*) the Commission's ultimate finding (p. 16 above) "is within the powers of the Commission, . . . is based on substantial evidence, and is in accord with accepted legal standards," and was therefore final,[11] (*ii*) there was no basis for the theory of the Complaint that

> "dissenting stockholders (quite apart from any merit in the grounds of dissent) are entitled to preferential treatment, more favorable than the treatment accorded

[10] This was the only issue tendered by the Complaint. It was not broadened (Appellants' Brief, pp. 2, 10) by attaching a copy of the Commission's Report reciting various contentions in the administrative proceedings.

[11] Appellants criticize this reference to evidence (Brief, p. 10), for the Commission record was not supplied. But obviously the opinion, like the motion to dismiss (R. 182), meant the evidence as embodied in the findings of fact made by the Commission in its Report. Their range is indicated in 6 (*b*) above.

> to stockholders of the same class (holding the same securities) who did not dissent . . ." (R. 255)

and (*iii*) neither the Commission nor the Court undertook to pass on possible remedies in State tribunals, "whatever they may be", but they could be considered by the proper tribunal when presented to it.

It is from this order of dismissal that the appeal is taken.

8.

Consummation of the Merger

Pere Marquette and C&O were, of course, under fiduciary obligation to their stockholders, a large majority of whom desired the merger. If consummation were to be delayed beyond June 6, 1947, the Pere Marquette stockholders would probably lose the dividend payable to holders of C&O Common of record on that day, for Virginia law makes a merger operative at the time of entry of the Virginia Commission's order (R. 234) and that was the date as of which the Merger Agreement spoke, without provision for retroactive operation (p. 8 above). As might be imagined, any prospect of such a loss was most unwelcome to the majority holders of Pere Marquette Preferred (*e. g.*, R. 243-46).

So when the District Court denied a stay on June 4, 1947, and no appeal was taken or stay pending appeal requested, Pere Marquette and C&O, in accordance with announced plan (R. 234), consummated the merger by filing in Michigan and Virginia on June 6, 1947, and an order of the Virginia Commission was entered that day.

By far the greater part of each issue of Pere Marquette stock has now been surrendered in conversion (p. 13 above). Both issues of C&O stock are listed and traded on the New York Stock Exchange.

SUMMARY OF ARGUMENT

I.

The Commission Did Its Full Duty to Assure Just and Reasonable Treatment

By imposing on the Commission responsibility to see that the terms and conditions of railway mergers are "just and reasonable" and by making the Commission's authority "exclusive and plenary", Section 5 of the Interstate Commerce Act incorporates the same standard of equity practice that is embodied in the Bankruptcy Act and the Public Utility Holding Company Act. (See I, 1 below)

This standard of fairness takes into account all differences of fact. Foremost among these for a preferred stockholder in a solvent corporation is that, unlike a creditor, he has no right to compel immediate payment. (*Id.*)

All elements in his bundle of rights are, therefore, to be weighed by the administrative judgment in the light of all the circumstances, in comparison with the new securities, "to determine whether the new are the equitable equivalent of the old". (*Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R.*, 318 U. S. 523, 566, 1943).

The Commission here did not disclaim jurisdiction to require the "just and reasonable" equivalent of the old securities, but on the contrary weighed all the stipulated priorities of the Pere Marquette Preferred, including its accumulated dividends and preferential rights in the event of liquidation, in comparison with the terms and characteristics of the new securities, in the light of all the pertinent facts, including the history of the past and the prospects for the future, with respect to business, earnings, assets and other elements of value. This was a full discharge of its

administrative duty in accord with legal standards and its judgment is therefore final. (See I, 2 below)

No rule of law requires the Commission to abdicate the exercise of its administrative judgment in a railway merger and automatically award to the holders of Pere Marquette Preferred, without regard to the facts, cash or its immediate equivalent in the full amount of par plus accumulated dividends as their stipulated liquidation preference, because the meaning of "just and reasonable" is a matter of Federal law, which tolerates no such limitation on the Commission's function to reach a just result in all the facts. (See I, 3 below)

If Michigan law were to the effect that a merger automatically matures a liquidation preference, this would so impede the Federal policy for unifications as to fall within the "restraints, limitations, and prohibitions" from which railroads are automatically relieved by Section 5(11) upon the entry of an authorizing order of the Commission (*Texas* v. *United States*, 292 U. S. 522, 1934).

But, more fundamentally, the standard of fairness in itself requires this result here, just as the identical standard has been held to do under the Public Utility Holding Company Act (*Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 1945) and the Bankruptcy Act (*Vanston Bondholders' Protective Committee* v. *Green*, 329 U. S. 156, 1946).

In the application of this Federal standard of fairness, stockholders gain no additional rights by voting against the merger (*Reconstruction Finance Corporation* v. *Denver & Rio Grande Western R.*, 328 U. S. 495, 535, 1946) and lose none by voting for it, so the Commission properly treated all holders of Pere Marquette Preferred on the same basis and limited its action to assuring that each would be entitled to receive a "just and reasonable" award of new securities. (See I, 4 below)

II.

Possible Recoveries under State Procedure are Not In Issue Here

Since the Commission's function is solely to enforce Federal procedure by assuring stockholders of a "just and reasonable" award of new securities, it properly held that it had no province to decide whether they might obtain "better" than "just and reasonable" treatment through some surviving State procedure that might afford them alternative remedies. The Commission took no action with respect to any such potential remedies, either to enlarge or to restrict them, and they have no part in any issue here.

The order of the Commission is valid whether or not State procedures are superseded by the "exclusive and plenary" grant of power to the Commission, for if Section 5 automatically occupies the whole field, there is no need for the Commission to say so, and if it gives the Commission discretionary authority to supersede State procedures where needed for the free play of Federal policy, the Commission justifiably abstained from such foreclosure here because the potential claims are so small in relative amount as to support its finding that they "will not involve a burden of excessive expenditure".

It is clear from the Commission's Report that possibilities of recovery by dissenters through State procedure were not counted as an element in their "just and reasonable" treatment which the Commission was concerned to assure.

The Commission, therefore, did its full duty when it required a "just and reasonable" award of new securities and left for the courts the decision on any alternative remedy under State procedure if and when asserted.

ARGUMENT

I.

The Commission Did Its Full Duty to Assure Just and Reasonable Treatment

1. *The Governing Standard*

The Commission's responsibility to protect private right, as well as public interest, is clear. Both text and history concur.

Unification of interstate railroads, in a pattern consistent with economical and efficient transportation service, has long been a fundamental policy of the Congress. It was first proclaimed in the great remedial measure of 1920, after the experience in World War I, by which the Interstate Commerce Act was reoriented from a policing measure into a constructive administrative program. *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy R.*, 257 U. S. 563, 585 (1922). Complete unifications, the ultimate goal, were provided for in paragraphs (4)-(6) of Section 5, though, unhappily, on conditions of conformity to a master plan and to physical value of the affected properties that served to block any utilization. Acquisitions of control, however, were also provided for, "either under a lease or by the purchase of stock, or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation", and this power was conferred in more flexible terms. They contemplated Commission approval if "in the public interest", but only "on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises." (37 Stat. 566) In sum, the Commission was given full power over acquisitions of control, upon its administrative application of the dual standard of public interest and private right.

The latter element of this standard received judicial interpretation in *Cleveland, Cincinnati, Chicago & St. Louis R.* v. *Jackson*, 22 F. 2d 509 (C.C.A. 6, 1927, the *Big Four Case*). This was an application by a stockholder of the Big Four to enjoin consummation of a lease of the Big Four properties to the New York Central. Application had been filed with the Commission, and was then pending before it, for suitable authorization under Section 5(2). The District Court's grant of a preliminary injunction was reversed on the ground that the petition was premature, since the complainant would be entitled, before the lease could be consummated, to be heard in the proceedings before the Commission (and also, for that matter, in court review if desired) and in those proceedings it would be the Commission's duty to consider and protect the private rights of investors:

> "We think it is the duty of the Commission to protect both the public and private interests, and although it finds that the acquisition will be in the public interest, it may not approve the lease unless it further finds that the consideration, terms and conditions thereof are just and reasonable—just to the lessor, the lessee, and necessarily to the stockholders of each. The ruling in the Nickel Plate Case, 105 Interst. Com. Com'n R. 425, evidences such an interpretation of its duties by the Commission.
>
> "While it is true, as plaintiff contends, that the law does not require that minority stockholders be made parties to a proceeding before the Commission seeking the approval of a lease, it is also true that the Commission has heard such stockholders when requested to do so, and that the statute itself, as we construe it, requires that the interest of the stockholders be considered and protected. Furthermore, the orders of the Commission authorizing a lease are subject to review on behalf of a stockholder in a court proceeding. Chicago Junction Case, 264 U. S. 258, 44 S. Ct. 317, 68 L. Ed. 667; 38

Statutes at Large, p. 220 (28 USCA §47). It results, therefore, that before the lease can be made effective, an objecting stockholder has the right to present his case before two tribunals, both of which are charged with the duty of protecting his interest." (510-11)

With this judicial record before it, the Congress, in revising Section 5 by Emergency Railroad Transportation Act of 1933, adopted the phrase "just and reasonable" as a key concept governing all forms of unification and acquisitions of control. They were all swept into a single clause (paragraph (4), now paragraph (2), of Section 5); the value requirement was omitted; and the Commission was given full authority, subject only to conformity with its master plan (a limitation omitted in 1940), to authorize unifications and acquisitions of control of any kind upon finding that, "subject to such terms and conditions and such modifications as it shall find to be just and reasonable", the transaction would "promote [now, "be consistent with"] the public interest" (48 Stat. 217).

At that time the Congress was deeply concerned with the future of the railroads and the fairness of the treatment to be accorded their security holders. Just three months before it had enacted the first railroad bankruptcy legislation (Section 77), in which it gave the Commission authority for initial determination of all matters of private right in bankruptcy reorganizations. Both acts may well be thought a part of a Congressional effort to center in the Commission, as the single expert tribunal, the administrative determination of all these matters throughout the field. Together they cover the two situations most likely to produce modifications of stockholder position, that is, the pressure of debt, from which bankruptcy proceedings may result, and the unification of different systems, where property interests must be adjusted into a common frame.

These implications are strengthened by the further amendment of 1940 (54 Stat. 905) in which the Commission's power to authorize unifications was characterized in terms as "exclusive and plenary" and corporate power was conferred to carry out Commission orders (paragraph (11) of Section 5). The quoted words are ordinarily given the effect of preëmpting the field, at least on all subjects touched in the Federal regulation (*Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 1947). They require, therefore, a "plenary" interpretation of "just and reasonable" even if not previously necessary.

In this setting of policy and history, "just and reasonable" undoubtedly refers to the classical tradition of equity practice and is thus identical with the "fair and equitable" standard in the Bankruptcy Act and the Public Utility Holding Company Act. To be sure, the words "fair and equitable" are words of art (*Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 1939). But the particular form of that phrase is not talismanic in itself. The same standard is equally denoted by the word "just" alone (*Northern Pacific R.* v. *Boyd*, 228 U. S. 482, 508, 1913; *Case* v. *Los Angeles Lumber Products Co.*, at p. 118). Indeed, the two forms "just and reasonable" and "fair and equitable" are not infrequently blended. Thus the "fair and equitable" standard in Section 11 of the Holding Company Act was referred to as "fair and *reasonable*" by the Second Circuit[12] and in the *Big Four Case* itself the "just and reasonable" standard was referred to as "*fair* and just" (22 F. 2d at p. 511).

Since this is a pervasive standard of fairness, it applies to solvent companies as well as insolvent ones (*Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 527, 1941) and not only between debt and stock but also between classes

[12] *New York Trust Co.* v. *S. E. C.*, 131 F. 2d 274, 276 (C. C. A. 2, 1942), *cert. den.*, 318 U. S. 786 (1943), italics supplied.

of stock (*Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 634, 1945). But, as a standard of fairness, it takes into account all differences of fact. Most conspicuous of these, in the case of a preferred stockholder in a solvent corporation, is that, though having certain rights to preferential treatment over the common at some time, those rights are not, apart from liquidation or some exceptional circumstance of fraud, presently enforceable so as to compel immediate payment. For example, it was said in *Porges v. Vadsco Sales Corporation*, 32 A. 2d 148 (Del. Ch., 1943), in denying an injunction against a merger which would recognize common stock though net assets per books were less than the par and accumulated dividends of the preferred:

> "But the corporation is not in liquidation, and complainant has shown no semblance of a right in the preferred stockholders to require that it be liquidated. The corporation is a going concern; and it is necessary to view the rights of the two classes of stock in the light of the probability that it will continue thus for an indefinite period." (151)

The same concept has been repeatedly applied by the Securities and Exchange Commission in the administration of Section 11 of the Holding Company Act:

> "Absent liquidation, the liquidation preference of a senior class of stock is only an inchoate right to a future payment, which has no definite maturity date, and which will not mature into a present claim despite failure to pay dividends."[13]

[13] *Federal Water Service Corporation*, 8 S. E. C. 893, 910-11 (1941), reversed on other grounds, *Chenery Corporation* v. *S. E. C.*, 128 F. 2d 303 (App. D. C., 1942), affirmed, *S. E. C.* v. *Chenery Corporation*, 318 U. S. 80 (1943). A recent example, from the numerous available cases, is *The Middle West Corporation*, Holding Company Act Release No. 7905 (December 9, 1947).

It follows that stated dividend preferences and stated dissolution preferences can not be viewed, in determining fair treatment, except as elements in the whole bundle of rights to be compared, in the light of all the circumstances, with the new securities "to determine whether the new are the equitable equivalent of the old" (*Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R.*, 318 U.S. 523, 566, 1943). Since "such a determination rests in the realm of judgment rather than mathematics" (*id.*, 567), it is distinctively a matter for the informed discretion of the Commission.

The issue, therefore, is not, as appellants argue (Brief, pp. 26-27), whether the full priority rule applies in mergers under Section 5, but whether the Commission exercised its informed discretion in accordance with that standard.

2. *The Commission Applied the Governing Standard*

The applicable standard being so identified, we now ask whether it was in fact applied by the Commission. For that we turn to the report itself, to show that the Commission did not disclaim jurisdiction to enforce the just and reasonable equivalent of the old securities, as appellants urge for the fundamental premise of their case, but on the contrary undertook to apply that standard with all the resources at its command.

As we have seen in the Statement above, the Commission refused to limit itself to any one line of evidence but gave consideration to "all relevant elements of value" (R. 43). It obviously gave most weight to prospective earnings, as indicated by the earnings in the past, developments in wartime and the business history and prospects of the territory served (R. 43-46). But physical values were also examined, as indicated by book values and final value for rate making

purposes plus subsequent net additions (R. 46-47). Market quotations were also considered (R. 41-42). All these lines of evidence gave support to the merger terms. On earnings, the Commission noted that the holders of Pere Marquette Preferred would, for their old position in a company of unstable earnings, acquire a position in a company with a long record of unusually dependable earning capacity (R. 43-46, 48-49). For their old Preferred Stock, with its checkered dividend record, they would receive new securities of good quality, yielding a reliable return of 4.20% against the nominal, but uncertain, rate of 5% on the old. After exercising the conversion privilege of the New Preferred, their return would be increased to 5.88%, substantially greater than the nominal rate of their old stock. Weighing these relationships in the light of the relevant earnings record of the two properties, it was the Commission's conclusion that:

> "On the whole, it would seem that the prospects of Pere Marquette stockholders for returns on their investments would be enhanced by merger of their company into the Chesapeake and Ohio." (R. 50)

From the point of view of property values, the price to be paid by C&O, taking its Common Stock at par, was about the same as the net fixed assets of Pere Marquette per books (R. 58), excluding substantial net current assets (R. 18, 48), but making no deduction for unrecorded depreciation (R. 48), usually a large item in reorganization cases. Market prices of C&O securities allotted each share of Pere Marquette Preferred were 115% of the market price for the latter stock itself and about 4 times the market price of the allotment to Pere Marquette Common (R. 42).

Such was the business background in which the Commission considered the stipulated preferences of the Pere Marquette Preferred. Contrary to Appellants' Brief (pp. 19-20),

the Commission gave attentive consideration to the amount of accrued unpaid dividends, looking to the relevant provisions of the charter (R. 50), the total accrual as related to book values (R. 51) and the portion of the book accrual ($75) that had been actually earned ($30, R. 51). But the Commission properly treated the dividends in arrears as only elements in the whole bundle of rights rather than immediately enforceable claims, pointing out that:

> "Declaration of dividends is within the discretion of directors so long as the policy in this regard does not oppress the stockholders." (R. 51-52)[34]

The Commission was also at pains to note and summarize the stated liquidation preference, though obviously taking it also as an element in the bundle not intrinsically controlling, but to be evaluated in the light of all the facts.

We summarize now the specific elements of compensation to the holder of Pere Marquette Preferred for surrender of his old rights which were noted by the Commission in its Report and are mentioned in narrative sequence above. Foremost among these is the acquisition of position in a company of unusually dependable earning capacity, instead of an unstable one (R. 43-46, 48-50). In this more secure

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[34] In view of the suggestion in Appellants' Brief (p. 28) that dividends were withheld for partisan purposes of the C&O, we may note the Commission's comment that the use of funds for the benefit of the property rather than for dividends to Common stockholders

> "should make for their long-term best interests in protecting their equities against creditors and in preserving their company's property against deterioration." (R. 52)

The Preferred stockholders would, of course, receive these benefits first. The Commission further found, in general, that the C&O's policy with respect to Pere Marquette had been beyond criticism (R. 45) and ". . . both carriers have profited" (R. 14). The great rise in market prices of Pere Marquette stocks during this period, particularly the Preferred (R. 171), corroborates the wisdom of these policies.

setting his choice is an enviable one, for he can have priority of claim (as a first, rather than a second, preferred stock) for more than half his income by reducing the rate from an old 5% to a new 4.20%, or, by foregoing priority and exercising his privilege to convert, he can increase his new rate to 5.88%. That is computed on the present Common dividend rate, the continuation of which is a reasonable expectation (R. 49). In addition, he acquires a participation in all future earnings above that level. In a word, his "prospects . . . for returns . . . are enhanced . . ." (R. 50). There is further compensation in the Retirement Fund provided for the New Preferred (R. 22-23). The redemption price and the stated liquidation preference of the New Preferred are par and accumulated dividends plus a premium of 5 points, in contrast to the Pere Marquette Preferred, which was not entitled to any premium (R. 23, 27, 50). His voting power is immediately increased from 1.00 vote per old share to 1.20 votes per old share and, if he converts, it is further increased to 1.68 votes per old share. His allotment of new securities is nearly 4 times the allotment per share of Pere Marquette Common in terms of market value when the Commission acted and over 7 times in terms of par value. These are customary and significant methods of compensation (*Consolidated Rock Products Case, supra,* at p. 528), which it is the task of the Commission to weigh (*Milwaukee Case, supra,* at p. 571).

It was only after all this review that the Commission reached its ultimate finding, already quoted in the Statement, that:

> "Accordingly, considering the Pere Marquette's investment according to its books, other property values, the company's history as to earnings, its future prospects, and the market appraisal of its stocks, all as set forth above, we find that, as to the stockholders of both

parties generally, the proposed ratios of exchange, stock issues, and assumptions of indebtedness are just and reasonable." (R. 52)

Appellants' contention (Brief, pp. 27-28) that C&O was predisposed to favor the Pere Marquette Common because it owned 70% of the issue, is irrelevant because the Commission made its finding of fairness on the basis of its own independent consideration. Moreover, it is untrue, for in the merger C&O acquired all assets of Pere Marquette, so it made no substantive difference to C&O whether its holdings of Pere Marquette Common were recognized or cancelled. The only effect of recognizing them was to put some of C&O's own stock in its treasury, thus facilitating the mechanics of future stock financing on its part (R. 64-65), which, if consummated, will be of benefit to all security holders. Disregarding this treasury stock, the publicly held Pere Marquette Common received only 7.5% of the total price paid for Pere Marquette's equity in its assets, including treasury stock, the percentage shrinks to 5.8%.[15]

Previous decisions of the Commission on new acquisitions of control by purchase of majority stock, urged by appellants (Brief, pp. 23-24), show only a Commission policy to provide equality of opportunity by opening up a purchase offer to include minority shares. But equality of opportunity is automatically assured by the Merger Agreement here involved, since it provided identical treatment for all. The Commission has uniformly accepted "just and reasonable" treatment thus provided in identical terms for all as a satisfaction of the statutory standard in every merger or

[15]Were the funded debt of Pere Marquette (assumed in the merger) included as part of the purchase price for this calculation, the percentage would, of course, sharply decline. C&O stocks issuable in the merger are included in this calculation at par.

consolidation since 1920, without imposing any condition for special treatment of dissenters or non-assentors.[16]

The question of fair treatment for Pere Marquette Preferred is not before this Court for determination. That was a matter confided to the discretion of the Commission as the expert administrative agency, and its judgment is final if in accord with legal standards. The Commission, we submit, manifestly made a full discharge of its administrative duty in accord with legal standards. It may, indeed, be observed that the Commission, enlightened by successive decisions of this Court and by its own extensive experience under Section 77, has shown a more sensitive regard for treatment of security holders here than in any previous unification case, and has covered in its Report the full field of examination customary in the reorganization cases.[17]

3. *No Rule of Law Gives Controlling Effect to Dividend Accumulations or Stated Liquidation Preference*

Appellants urge that, quite apart from the evidence, the Pere Marquette Preferred has rights under the charter and Michigan law which, as a matter of law, made it the duty of the Commission to give more favorable treatment. While ostensibly they now give most emphasis to dividend accumulations (Brief, pp. 2, 6), in the hope of stepping around a decision of this Court to be mentioned below, it is obvious

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[16] *Toledo & Ohio Central R. Merger*, 228 I. C. C. 433 (1938); *Cleveland, C., C., & St. L. R. Merger*, 228 I. C. C. 240 (1938); *Gulf, Mobile & Ohio R. Merger*, 236 I. C. C. 61 (1939); *Delaware & Hudson R. Merger*, 257 I. C. C. 453 (1944). There were no mergers before 1933 for the reasons stated in the text (p. 24). Acquisitions of assets were permitted as extensions of line under § 1(18). *Acquisition by P. and W. Va. R.*, 150 I. C. C. 81 (1928).

[17] No problem of inadequate Commission findings can, therefore, arise (cf. Appellants' Brief p. 9, n. 1). Nor is there any basis for appellants' claim (Brief, p. 8) of an admission that priorities were not considered.

that no event has occurred to make them immediately enforceable, for "There is no covenant to pay accumulated dividends on such stock in cash before a merger may take place" (*Hubbard* v. *Jones & Laughlin Steel Corporation*, 42 F. S. 432, 437, W. D. Penn., 1941). There could be no right to present payment of accumulations unless the merger were treated as an event that precipitates the stated dissolution preference of par plus accumulated dividends.[18] That is, at bottom, what appellants urge.[19] So we deal with both arguments under the inclusive concept of the stated liquidation preference.[20]

Our point here is that the Commission was free "to determine whether the new are the equitable equivalent of the old" (*Milwaukee Case, supra*, p. 566) by balancing the equities in all the facts without being controlled by the stated liquidation preference, because the meaning of "just and reasonable" is a matter of Federal law and in the application of that standard a merger does not mature a stated liquidation preference. Additionally, we believe that Michi-

[18]In Michigan also it is clear, as in other jurisdictions, that dividends on preferred stock are not debts but payable only out of earnings when declared. *Knight* v. *Alamo Mfg. Co.*, 190 Mich. 223, 157 N. W. 24 (1916); *Ellsworth* v. *Lyons*, 181 F. 55 (C. C. A. 6, 1910); *Lockhart* v. *Van Alstyne*, 31 Mich. 76 (1875).

[19]Brief, p. 7, p. 8, n. 2, p. 9, n. 3 and p. 20. It was also the claim on which they came into this Court (Jurisdictional Statement, p. 7).

[20]It is beyond argument, we believe, that preferred arrearages may be converted in a merger. *Havender* v. *Federal United Corp.*, 24 Del. Ch. 318, 11 A. 2d 331 (Sup. Ct., 1940); *Hottenstein* v. *York Ice Machinery Corp.*, 45 F. S. 436 (D. Del., 1942), aff. 136 F. 2d 944 (C. C. A. 3, 1943); *Hubbard* v. *Jones & Laughlin Steel Corp.*, *supra*; *Porges* v. *Vadsco Sales Corp.*, *supra*; *Anderson* v. *International Minerals & Chemical Corp.*, 295 N. Y. 343, 67 N. E. 2d 573 (1946); see *Wessell* v. *Guantanamo Sugar Co.*, 134 N. J. Eq. 271, 35 A. 2d 215, 216-17 (Ch., 1944), aff. *Murphy* v. *Guantanamo Sugar Co.*, 135 N. J. Eq. 506, 39 A. 2d 431 (Ct. Er. Ap., 1944). The preferred stockholder does not thereby become entitled to a money judgment. *Langfelder* v. *Universal Laboratories*, 163 F. 2d 804 (C. C. A. 3, 1947).

gan law is to the same effect,[21] but we leave that on one side to emphasize the Federal rule.

This result is required, in the first place, to give full effect to Federal policy. There is no difference, for any practical business interest of stockholders, between a merger of Pere Marquette into C&O, on the one hand, which appellants say matured their rights as provided in the liquidation preference, and a merger of C&O into Pere Marquette, on the other hand, where the corporate entity of Pere Marquette would survive and no basis would exist, however technical, for urging any liquidation of Pere Marquette. Moreover, it is settled in Virginia[22] in accord with the prevailing

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[21] Thus in *Guardian Depositors Corporation* v. *Currie*, 292 Mich. 549, 291 N. W. 2 (1940), it was said (contrary to appellants' position, Brief, pp. 8-9, nn. 2-3):

> "'. . . a consolidation of corporations, under statutes which impose all obligations and confer all rights of the constituent companies on the consolidated company, is to be regarded merely as a continuance of the old corporations, under a new name, as to the business of the old corporations. . .'
>
> ". . . the Michigan charter was not extinguished and the State corporation is not thereby dissolved. . ." (5-6)

When the business continues and no dissolution occurs, there is no winding up, and the right to stipulated treatment before the common stock out of any balance after paying creditors can not apply. The case sustained recovery by a creditor and the transaction was a consolidation of a Michigan bank, by permission of Michigan statute, with a national bank, under authority of a Federal statute. In the case at bar, the merger of the Michigan corporation was made, by permission of Michigan statute, into a Virginia corporation, under authority of a Virginia statute. Virginia follows this same doctrine (n. 22 below). Additional Michigan authorities appear in n. 7 above.

[22] *Adams* v. *U. S. Distributing Corp.*, 184 Va. 134, 150, 34 S. E. 2d 244, 251, 1945, *cert. den.*, 327 U. S. 788 (1946). The Court said:

> "It is well settled in this State that the merger of two corporations does not end the existence of either, but continues the existence of both in the merged corporation." (150)

In result, a merger does not "work a 'dissolution or liquidation' . . . within the meaning of the preferred stock clause". (151)

weight of authority,[22] that a merger works no liquidation of either constituent company. It is important for the unification policy that railroads seeking to merge shall be free to follow whichever of these two routes happens, in the facts of the particular situation, to be more economical and advantageous, without being penalized by heavy dissolution payments precipitated by choice of mere legal form.

No obligation for such a payment arises by the terms of the preference here involved. They speak only of "any liquidation, dissolution or winding up" of the Pere Marquette (App. B). Mergers, though equally familiar, are not named. Had they been intended, they would have been named. Being not intended, they can not be given the same effect as if intended unless by some rule of Michigan law. If such a rule existed, which it does not, it would so obstruct the unification program as to conflict with Federal policy. It would thus be one of the "restraints, limitations, and prohibitions" of State law from which the railroads are automatically "relieved" by Section 5(11) upon the entry of an authorizing order of the Commission. This follows *a fortiori*, as more burdensome and obstructive, from *Texas* v. *United States*, 292 U. S. 522 (1934), holding that a Texas requirement for maintenance of local offices and shops yielded to Commission authorization for their removal upon

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[22] *Windhurst* v. *Central Leather Co.*, 101 N. J. Eq. 543, 138 A. 772 (Ch., 1927), 105 N. J. Eq. 621, 149 A. 36 (Ch., 1930), 107 N. J. Eq. 528, 153 A. 402 (Ct. Er. Ap., 1931), app. dism., *Ingraham* v. *Central Leather Co.*, 76 L. ed. 1299 (1931); *Porges* v. *Vadsco Sales Corp.*, 32 A. 2d 148 (Del. Ch., 1943); *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 631 (1945). *Petry* v. *Harwood Electric Co.*, 280 Pa. 142, 124 A. 302 (1924), once declaring the contrary, is no longer operative, for the act (Purdon's Pennsylvania Statutes Annotated, Title 15, Sec. 2852-908) was amended (Mar. 31, 1941, P. L. 13, No. 7A) to make exclusive the appraisal remedy of "fair value of his shares as of the day prior to the date on which the vote was taken".

acquisition of control by a foreign road. The expanding powers of the Commission under the successive amendments to Section 5 were stressed, even though prior to the 1940 amendment, in these words:

> "These broadening provisions of the Emergency Railroad Transportation Act, 1933, confirm and carry forward the purpose which led to the enactment of Transportation Act, 1920. . . . To attain that end, new rights, new obligations, new machinery, were created. . . . It is a primary aim of that policy to secure the avoidance of waste. . . . The authority given to the Commission to authorize consolidations, purchases, leases, operating contracts, and acquisition of control, was given in aid of that policy. . . ." (530-1)[34]

But this need not be faced as a new point, either in terms of policy or in terms of superseding State restraints, for it has been settled by decisions of this Court in terms of the governing standard itself. It is settled that the "fair and equitable" standard is a matter of Federal law, to be interpreted consistently with the classic standard of the Federal equity courts, both as used in the Bankruptcy Act (*Vanston Bondholders' Protective Committee* v. *Green*, 329 U. S. 156, 1946) and in the Public Utility Holding Company Act (*Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 1945). The "just and reasonable" standard, being identical, as we have shown (p. 27 above), has the same standing.

The holding of the *Otis Case* was that a stipulated liquidation preference, admittedly valid under State law, was not controlling for fair and equitable treatment and a Commission order recognizing old common stock was thus not in-

[34] See also *In re New York, New Haven & Hartford R.*, 147 F. 2d 40, 52 (C. C. A. 2, 1945), *cert. den.*, 325 U. S. 884 (1945).

validated by its failure to give the preferred present value equal to its stipulated liquidation preference. The ground of the decision was that the applicability of the charter provision under the fair and equitable standard was "a matter of Federal law" (636), from which it follows that the Commission was empowered to treat the

> "rights of the preferred stock to $6 annual cumulative dividends in the going business and to full priority in liquidation other than by operation of the Act . . . as factors in valuation rather than determinative of amounts payable. . ." (631-32)

In that case the form of the transaction was that of a typical liquidation, but the Court reasoned that fair and equitable treatment was not controlled by mere form of legal technique, since the same result could have been achieved by merger and "merger . . . would avoid the liquidation" (631, 637-38). The holding is decisive here.

The *Vanston Case* held that an indenture covenant for payment of interest on interest in arrears, even if valid under State law, need not be recognized under the fair and equitable standard of the Bankruptcy Act, because in conflict with "the equitable principles" governing distributions thereunder (163), since they embody a policy of "uniformity, ratable distribution and fairness and equity" (165).

Along the same line, it was held in *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 89 (1943), that "fair and equitable" was an evolving concept that might be given new meaning by a Federal agency according to its own views without being bound by "settled judicial precedents", even when determining the treatment to be given stock created, issued and purchased under State law. When the case came up again,[*]

[*] *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194 (1947).

after further administrative action, the Commission's order was sustained, though its denial of equal recognition to old preferred stock purchased by company officers was admittedly beyond justification by any rule of State law, under which the corporation was organized, the stock issued and the purchases made. These are, after all, but applications to the particular standard here involved of the classic rule that the terms of Federal legislation are to be interpreted as a matter of Federal law, though a different conclusion might follow under the law of the particular State (*Cleveland, C., C. & St. L. R.* v. *United States*, 275 U.S. 404, 1928).

The *Otis Case* is not to be distinguished on the ground that it applies an affirmative policy of the Congress, eventuating in an affirmative command by the Securities and Exchange Commission. It is concerned, none the less, with the meaning of the same standard that governs here. Moreover, no such affirmative requirement was involved in the *Vanston Case*. There the Congress merely provided an equitable rule for the distribution of value in an enterprise choosing to avail of the procedures of the Act. That is the case here. Furthermore, dealing with railroads, as the Interstate Commerce Act does, it proclaims Federal policy of exceptional force for the maintenance of such rules as will best facilitate widespread unifications into more efficient instruments of transportation. One of the most natural expectations of the Congress in such a context is that each constituent company would, from the intensely practical point of view of fair treatment, continue in business. If, indeed, the question were to be decided, not on these broad grounds of policy, but in terms of legal technique, Section 5(11), as enlarged by the 1940 amendment, now conveys an express grant of corporate power to accomplish anything authorized by Commission order, and that may well be taken as a Congressional mandate for any form of corporate power to

merge that will permit the just and reasonable standard to be applied on a practical basis."

We submit, therefore, that, without regard to the law of Michigan, the Commission was not only authorized, but bound, to act, as it did, on the premise that the stated dissolution preference was not in itself controlling.

It is a late hour for appellants (Brief p. 14) to raise constitutional objections to this result (*Louisville & Nashville R. v. Mottley*, 219 U. S. 467, 1911). No constitutional objection can be made to fair treatment, irrespective of consent (*Reconstruction Finance Corporation* v. *Denver & Rio Grande Western R.*, 328 U. S. 495, 533, 1946). Even creditors may be satisfied with stock, rather than cash, not only where the company is insolvent (*Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul Pacific R.*, 318 U. S. 523, 563-4, 1943) but also where it is solvent (*In re Standard Gas & Electric Co.*, 151 F. 2d 326, 329, C.C.A. 3, 1945, *cert. den.*, 327 U. S. 796, 1946). *A fortiori* this can be done to stockholders.

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*Section 5(11) does not "create or provide for the creation, directly or indirectly, of a Federal corporation", but that is not to say that it may not continue a pre-existing State corporation, still less that it does not confer corporate power to merge in such manner as to avoid "liquidation, dissolution or winding up." It provides in terms that "any power granted by this section to any carrier . . . shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State." The effect of these words, as an independent Federal grant of additional power to a State corporation, was made clear in the hearings:

> "Mr. Fletcher—The purpose of this section here is to have the Congress confer corporate power upon the railroads to consummate the plan which the Interstate Commerce Commission has approved." (Hearings before House Committee on Interstate and Foreign Commerce on H. R. 2531 and H. R. 188, 76th Cong., 1st Sess. (1939) 683; see Hearings before Senate Committee on Interstate Commerce on S. 1310, S. 2016, S. 1869 and S. 2009, 76th Cong., 1st Sess. (1939) 114-5)

4. *No Rule of Law Entitled Dissenters to Different Treatment*

Since the purpose of the standard of fairness is to provide an equitable equivalent of the old security, the rights of claimants are to be determined by the nature of their old security, and not by their personal feelings. This has long been the rule in the practical administration of the Bankruptcy Act:

> ". . . the classification should in nowise depend upon the nature of the claimant or his interest in the sense of his bias or leanings, but only upon the nature of the claim." (*J. P. Morgan & Co.* v. *Missouri Pacific R.*, 85 F. 2d 351, 352, C.C.A. 8, 1936, *cert. den.*, 299 U. S. 604, 1937, arising under Section 77.)

Specifically this means that the state of mind of a security holder is not a pertinent circumstance in shaping the Commission's duty, even though that state of mind be communicated in a formal dissent, but the controlling test remains the worth of his old security in all the circumstances (*Reconstruction Finance Corporation* v. *Denver & Rio Grande Western R., supra*, at p. 535). In all the railroad reorganization cases no approved plan gives any different treatment to dissenters."

As the act of dissent does not remove the dissenter to a favored class, by the same token no consequential remedy given him by State law can do so. This applies to any procedure under State law for the recovery of cash, for that adds no new substantive right to the agreed terms of the stock,

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"Permission for alternative consummation through sale, if authorized by court order, was included in most plans, and had it been availed of, dissenters would have had an opportunity to take their distributive share of the proceeds of sale in cash (rather than the securities given to assentors), but in fact that permission was never availed of in any case.

but only provides a State remedy for protection of those same terms in certain circumstances. While, by the weight of authority,[28] no such right exists except by appraisal proceedings expressly created by statute, we need not pause here to identify Michigan law in this respect.[29] It is sufficient here to observe that, from the point of view of State law, the Commission obviously has no authority to enforce these alternative remedies and, from the point of view of Federal law, they are, as mere alternative remedies, irrelevant to the "just and reasonable" standard. This follows from the discussion in 3 above, and is additionally required in this instance by the fact that no other result could supply a workable administrative rule.

On the other hand, as stockholders gain no additional rights, from the point of view of the Commission's duty, by dissenting, so they lose none by voting for the merger, as appellants urge (Brief, p. 20).[30] Section 5(11) requires specified assent of stockholders ("a majority" or "whatever different vote is required under applicable State law"), and does not blacklist such assentors from the Commission's protective scrutiny. Were they, in the view of the Act, to lose any rights by assenting, there would be no standard left to guide the Commission's action in their regard and nothing left for it to determine. The Congress could hardly have planned to facilitate unifications by denying protection to those who vote for them, and confining protection to those

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[28] Securities and Exchange Commission, "Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees", Part VII, "Management Plans without Aid of the Committees" (1938, pp. 542-43).

[29] Michigan presumably follows the majority rule, for it has cited with approval a leading case for that rule (see n. 7 above).

[30] A very different situation comes into being after the Commission acts and the merger is consummated. Stockholders then surrendering their stock in conversion undoubtedly relinquish any right to object.

who oppose. The statutory scheme here, just as in the Bankruptcy Act and the Public Utility Holding Company Act, must be that the Commission has full responsibility to determine just and reasonable terms for all security holders irrespective of consent. The Commission's finding as to fairness is thus equally applicable to all holders of Pere Marquette Preferred, whether assenting, non-assenting or dissenting.

From either point of view, therefore, it was the Commission's duty to treat all holders of Pere Marquette Preferred on the same basis. This is just what it did. The extent of their approval or disapproval in no way limited the scope of its duty, the Commission said, for it had to make the required findings "if not a single share be in dissent" (R. 40). Exploring all pertinent factors of stipulated priority and investment worth, the Commission reached its conclusion that the award of new securities was "just and reasonable". Refusing then to require any other or different treatment, the Commission made its statement, so misinterpreted by appellants, that:

> "In reaching the conclusion that the terms and conditions proposed by the applicant are just and reasonable, we have undertaken to do this [give them close scrutiny]; and, having reached that conclusion, performance of our duty in respect to stockholders is complete, in our opinion, when we make certain that all stockholders of the same class are to be treated alike." (R. 54)

To call this a holding that all may be denied just and reasonable treatment so long as all are treated alike (Appellants' Brief, pp. 20-21) is a play on words. Read simply, the words say, and the substance shows, that like treatment suffices only when that treatment is intrinsically just and reasonable, which the Commission had just found it to be.

5. *Conclusion*

The Commission, therefore, we submit, did its full duty to assure "just and reasonable" treatment by an administrative evaluation of all the stipulated priorities in the light of all the pertinent facts and its action, being in accord with legal standards, is conclusive.

II.

Possible Recoveries Under State Procedure Are Not in Issue Here

We have shown above that the Commission took into consideration all the stipulated priorities of the Pere Marquette Preferred and evaluated them in the light of all the pertinent facts to find their equitable equivalent in new securities; and that it was free to exercise its informed discretion on this basis without being required by law to accord controlling weight to the stipulated dissolution preference or to provide favored treatment for dissenters. We turn now from these substantive rights, which were to be converted under the "just and reasonable" procedure of Federal law, to the altogether different subject of alternative procedures possibly created by State law to afford realization on these same substantive rights.

Since the Commission's function is to enforce the remedial procedure appointed by the Congress, it may well seem irrelevant to ask what remedial procedures are contemplated by State law. That is just our point here. It is just what the Commission said:

> "Whether dissenting stockholders, as members of a class created by the merger, are entitled to *better treatment* under their charter contract with the Pere Marquette is a question not within our province to decide. . . ." (R. 54, italics added)

We must, of course, "read text in the light of context" (*S. E. C.* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 351, 1943). The Commission had just finished its discussion of the treatment of security holders, and had just stated its ultimate conclusion that the proposed treatment was "just and reasonable" (R. 52). It then took up, under the new heading "Jurisdiction", the contentions pressed upon it with respect to State-created remedies. Concretely, these could be of only two kinds, either a statutory proceeding for appraisal and payment in cash or a suit in equity or action at law to recover a money judgment. Such remedies were asserted most conspicuously by appellants, who claimed a privilege to recover, through such means, cash or its equivalent equal to their stipulated dissolution preference. So far as this may include any assertion of substantive right under State law, it has been dealt with adequately above, for the Commission considered it, among all other substantive rights, and the Federal standard does not allow it controlling effect. So far as it embodies a procedural claim, we discuss it now, as did the Commission.

The obvious meaning of the Commission, accordingly, is that, if stockholders are entitled to obtain better than "just and reasonable" treatment by virtue of any surviving procedure under State law, that is a question for the courts to determine when such procedure is invoked, and not within the "province" of the Commission to decide in a proceeding for enforcement of the Federal remedy. However "inclusive" be the Commission's power on the subjects confided to it (*Rochester Telephone Co.* v. *U. S.*, 307 U. S. 125, 142, 1939), this gives it no power to deal with other subjects, still less to enforce remedial devices of State law differing from the Federal remedy (*Pittsburgh & W. Va. R.* v. *U. S.*, 281 U. S. 479, 1930). The Commission's statement, drawn from the *Big Four Case* (p. 25 above), that objecting stockhold-

ers "have the right to present their case before two tribunals, both charged with the duty of protecting their interests" (Appellants' Brief, p. 18) presupposes, of course, that each tribunal functions within the scope of its jurisdiction. The Commission functions within the scope of its jurisdiction when it applies the "just and reasonable" standard. A reviewing court functions within its jurisdiction when it determines whether Commission action was within its power. If stockholders wish to initiate some different action under State law, beyond the scope of this issue, as in *Otis & Co.* v. *Pennsylvania R.*, 61 F. S. 905 (E. D. Penn., 1945), and other cases cited by the Commission, they must resort to whatever may be the tribunal having jurisdiction to entertain and determine such a case.

Thus no "inconsistency" (Appellants' Brief, p. 18) remains, once the true nature of the action taken here by the Commission is identified. Nor does any "bifurcated or trifurcated jurisdiction" (Appellants' Brief, p. 29) result in such manner as to impede the orderly accomplishment of Federal policy. The contemplation of the Act is precisely that any tribunal shall do only what it has authority to do.

The Commission's authority being limited to the enforcement of "just and reasonable" treatment, it rightly did nothing whatever with respect to possible alternative remedies under State law. It did not decide that such remedies were available, or that they were not available, or that any particular result might be obtained by following them if available. And it took no action to enlarge or restrict any such potential remedies. That being so, the Report in this respect is, at most, no more than a recital that such remedies may possibly exist. But mere recitals are not reviewable here, for this Court sits only to correct action that is without warrant in law, not to refine administrative recitals that have no operative effect by changing rights or granting or with-

holding a legal privilege. *Delaware & Hudson Co.* v. *U. S.*, 266 U. S. 438 (1925); *U. S.* v. *Los Angeles R.*, 273 U. S. 299 (1927); *U. S.* v. *Kansas City Southern R.*, 275 U. S. 500 (1927).

We have now said that the Commission (*i*) had no authority to enforce, or give effect to, State-created remedies and (*ii*) properly took no action whatever in that regard. That we believe sufficient for the purposes of this case. But, for fuller answer to appellants' arguments, we go on to point out that this is true no matter what interpretation may be ultimately given to Section 5, particularly its grant of "exclusive and plenary" authority, whether the result be to supersede all alternative remedies previously available under State law or not. It may, of course, be argued, on the one hand, that, since the Congress has appointed the Commission to enforce "just and reasonable" treatment for all stockholders in railway unifications, its policy precludes any State tribunal from trying its own hand at that task by different procedure, differently administered and culminating in the different award of a cash payment. On the other hand, it may be argued that the Congress, specifically disclaiming any intention to create Federal corporations (paragraph (11) of section 5), and choosing rather to supervise and encourage unifications by voluntary action on the part of State corporations, left in force any obligation for cash payment to dissenters annexed by State legislation as a condition to the merger privilege, at least in cases where the potential burden of the payment would not be so large as to impair the railroad's capacity for continued efficient public service. This argument is supported by the Commission's uniform administrative practice to leave State appraisal rights operative in cases of merger or consolidation.[21] But that issue does not arise here and need

[21] See n. 16 above.

not, therefore, be decided. No one is here seeking, and no one could seek here, to enforce an appraisal right or any other alternative remedy under State law. The question whether any such remedy still exists can be determined only where it is, or shall be, asserted.

Obviously Section 5, in adopting the historical canon of equity practice, did not itself impose on the Commission any duty to administer State remedies, for that would defeat the uniform operation of the Federal standard and leave it at the mercy of differing State procedures, just as had been the case before 1920 in the issuance of securities, where it was the acknowledged purpose of Section 20a to substitute a single Federal pattern. Nor could State law, *ex proprio vigore*, thrust such a duty on the Commission in contravention of Federal enactment. So the Commission, in applying the Federal criterion of "just and reasonable" treatment, had no need to forecast the probable results that might be reached through any such alternative State procedure. Moreover, the Commission had no duty here to arrest or terminate any alternative State procedure, for the following reasons:

1. If it be the design of Section 5 to occupy the whole field of security holder treatment and thus supersede State remedies, then that result ensues by operation of Section 5 itself, either from the time of its enactment or at least upon the entry of an authorizing order of the Commission, by automatic operation of law, without need for the Commission to say so.

2. Alternatively, it may be the design of Section 5 (seeking, as it manifestly did, to leave State legislation in effect so far as could be accommodated with the national aim) to invest the Commission with discretionary authority according to the facts of the particular situation. If so, there is evidence here to support the Commission's abstention from

such foreclosure. The shares dissented within the 3 months' period provided by the Merger Agreement and the Virginia statute, computed on the highest imaginable basis (in the case of the Preferred Stock, at its stated liquidation preference) would require far less cash than amounts which the Commission found "will not involve a burden of excessive expenditure" (R. 55-56). While preponderant reasons make for the result that the class of possible dissenters closed at the expiration of the 3 months' period, there is no need to invoke them here, for in the meantime so many holders have surrendered their old stock in final conversion that the amount now outstanding is only a minor fraction of the potential dissent envisaged and considered by the Commission. Specifically, the unsurrendered shares of Pere Marquette of all classes, computed on the highest imaginable basis (that is, the book value found by the Commission, R. 55, including, as stated above, the Preferred Stock at its stated liquidation preference) aggregate only 39.5% of the sum which the Commission found would "not involve a burden of excessive expenditure". This finding means that, while appraisal rights might in the abstract loom so large as to "frustrate" Federal policy (R. 53 and Appellants' Brief, p. 18), they are not sufficient to do so here, but on the contrary are too small to be significant in the present case and thus need not be superseded as a "restraint" of State law. An estimated maximum is adequate basis for authorizing assumption of obligation and liability, even if such a litigation claim were to be deemed an "obligation or liability . . . in respect of the securities of any other person" within the meaning of Section 20a (Appellants' Brief, pp. 21-23).

Quite apart from all these considerations, appellants can not complain that the Commission took no action to foreclose possible State remedies, for the result, at most, is only to leave them with an additional remedy they would not

otherwise have had. This is no injury. Litigants will not be heard to complain except of some injury to them. *I. C. C.* v. *Chicago, Rock Island & Pacific R.*, 218 U. S. 88, 109, (1910); *Edward Hines Trustees* v. *U. S.*, 263 U. S. 143, 147-8, (1923); *Sprunt & Son* v. *U. S.*, 281 U. S. 249, 251-7, (1930).

The only other point of interest in this connection is that the Commission, not needing to take State procedures into account in its determination of "just and reasonable" treatment, actually did not do so. Our point here is that, whatever may have been the Commission's expectations with respect to alternative remedies under State law, they did not in any way influence its administrative determination of "just and reasonable" treatment, so their validity is not a condition to the finality of its order. It is clear, as a matter of reasoning, that the Commission could not possibly have given weight to these potential remedies, for it made no effort to determine whether any such remedy was actually available, still less to determine what it would actually yield on prosecution, if available, but only the maximum that it conceivably might yield. No weight could have been given to unascertained possibilities. But we are not left to reason alone. The Commission has disclosed the full basis for its administrative approach. The rule applied was to be sure the proposed treatment is "just and reasonable" and that everyone can get it, that is to

> "make certain that all stockholders of the same class are to be treated alike" (R. 54).

All holders of Pere Marquette Preferred were viewed (I, 4 above) as being in "the same class" and manifestly those who voted for the merger could not thereafter attack it and recover cash. "Like" treatment, therefore, means like allocation of new securities. In other words, the possibility

of cash recovery by dissenters under State procedure was not counted as an element in their "just and reasonable" treatment. For dissenters, as well as assentors and non-assentors, the Commission looked to a "just and reasonable" award of new securities and held that all stockholders were treated properly when all were given a right to receive it, with no discrimination against non-assenting minorities.

The Commission, therefore, was altogether uninfluenced by possible State remedies in its application of the Federal standard, which alone was its responsibility. Possible remedies of that kind, therefore, are not only not in issue here, but also have no pertinence to anything that is in issue here.

CONCLUSION

The order of the Court below should, therefore, be affirmed.

Dated December 26, 1947.

Respectfully submitted,

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APPENDIX A

EXCERPTS FROM SECTIONS 5 AND 20a OF THE INTERSTATE COMMERCE ACT, AS AMENDED

Sec. 5. (2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e)), and shall afford reasonable opportunity

for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a

railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be

entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

* * * * * * *

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

* * * * * * *

(9) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate.

* * * * * * *

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State

law in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the anti-trust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

(12) If any provision of the foregoing paragraphs of this section, or the application thereof to any person or circumstances, is held invalid, the other provisions of such paragraphs, and the application of such provision to any other person or circumstances, shall not be affected thereby.

(13) As used in paragraphs ~~(2)~~ to (12), inclusive, the term "carrier" means a carrier by railroad and an express

company, subject to this part; a motor carrier subject to part II; and a water carrier subject to part III.

* * * * *

SEC. 20a. (1) That as used in this section the term "carrier" means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general system railroad system of transportation) which is subject to this part, or any corporation organized for the purpose of engaging in transportation by railroad subject to this part.

(2) From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform

that service, and (b) is reasonably necessary and appropriate for such purpose.

(3) The Commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of the foregoing paragraph (2).

* * * * * * *

(6) Upon receipt of any such application for authority the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service, or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the Commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceedings. The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority.

(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in

accordance with the provisions of this section without securing approval other than as specified herein.

* * * * * *

(10) The Commission shall require periodical or special reports from each carrier hereafter issuing any securities, including such notes, which shall show, in such detail as the Commission may require, the disposition made of such securities and the application of the proceeds thereof.

(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization. . . .

APPENDIX B

MICHIGAN RAILROAD, BRIDGE AND TUNNEL COMPANIES ACT, AS AMENDED

(Act No. 198 of the Public Acts of 1873, Article 2, Sections 29-30, as last amended by Act No. 4 of the Public Acts of 1946; Michigan Statutes Annotated (1946 Cum. Supp.) Sections 22.233-4)

SEC. 29. Subject to the approval of the interstate commerce commission in any case where that commission has jurisdiction and in all other cases subject to the approval of the Michigan public utilities commission, any railroad company organized under the laws of this state, or under the laws of this state and any other state or states or country, and owning or operating, or authorized by its charter to construct or acquire, a railroad forming a continuous or connecting line with that of any other railroad company, or companies, may consolidate with such other company or companies, or may merge or be merged into any such other company, so that said companies shall thereafter be a single corporation. The directors of said 2 or more companies or corporations may enter into an agreement under the corporate seal of each corporation, for the consolidation or merger of the said 2 or more corporations, prescribing the terms and conditions thereof; the mode of carrying the same into effect; the name of the new corporation in the case of a consolidation or of the corporation that is to survive in the case of a merger; the numbers of the directors thereof, and in case of a consolidation the names of those who shall be the first directors of the new corporation, which shall be deemed and taken to be the first election of the directors of the new company, which number shall not be less than 5 nor more than 15; the time and place of holding the first elec-

tion of directors of the new corporation after the consolidation, which time shall not exceed 6 months after such consolidation has been sanctioned by the stockholders of said 2 or more corporations, as hereinafter provided; the number of shares of capital stock which the new or surviving corporation is authorized to have; the amount of its authorized capital stock, which amount shall be the aggregate par value of all authorized shares having par value, plus the aggregate amount of value placed in the agreement of consolidation or merger upon all authorized shares of non-par value; the classes of stock authorized, any of which classes may be with or without nominal or par value, with such designations, relative rights, preferences, conditions, limitations, restrictions and voting rights as shall be specified; the number of shares of each class having par value, with the par value of each share; the number of shares of each class having no par value, with the value placed upon each share of each class, and the consideration for which the company may issue and sell such shares, or authorization to the board of directors to fix such consideration from time to time, which consideration shall in no event be less for any such share than the value placed thereon in the agreement of consolidation or merger,—and when the consideration for which any such share was authorized to be issued shall have been received by the company such share shall be deemed to be fully paid and non-assessable; the manner of converting the capital stock of each corporation into the capital stock of the new or surviving corporation, or the manner of otherwise disposing of said capital stock; with such other details as they shall deem necessary to perfect such consolidation or merger: Provided, however, That in case of a merger it shall not be necessary for such agreement to contain the provisions above specified with regard to directors and capital stock of the surviving corporation

unless, and then only to the extent that, changes in respect to such matters are to be made by such merger agreement; and such new or surviving corporation shall possess all the powers, rights and franchises conferred upon the 2 or more corporations that are parties to such agreement: Provided, however, That any power, right, franchise, privilege or immunity possessed by either or any of the consolidating or merging companies of a kind which would not be possessed by a company organizing originally under the provisions of this act, as now existing or as hereafter amended, shall be utterly lost, annulled and abrogated; and such new or surviving corporation shall be subject to all the restrictions and perform all the duties imposed by this act as now existing or as hereafter amended as if it were a corporation originally organized thereunder. Such agreement of the directors shall not be deemed to be the agreement of the said 2 or more corporations until after it has been submitted to the stockholders of each of said corporations separately at a meeting thereof, to be called upon a notice signed by the secretary or assistant secretary of the corporation, stating the purpose of the meeting, and published at least once in each week for 4 successive weeks in 1 daily newspaper, if any there be, published in the place where each corporation maintains its principal office within the state, the first publication to be at least 60 days before the time specified for the meeting, nor until it has been sanctioned by a majority vote of the stockholders of each class of stock having voting powers, each share entitling the holder thereof to 1 vote, which vote may be cast by the holder in person or by proxy; and when such agreement of the directors has been so sanctioned by each of the meetings of the stockholders separately, in the manner above mentioned, then such agreement of the directors shall be deemed to be the agreement of the said 2 or

more corporations. A copy of such agreement of consolidation or merger filed in pursuance of this act, and the acts amending or revising the same, with the secretary of state, and certified by him to be a copy, shall in all courts and places be presumptive evidence of the consolidation or merger, as the case may be, of said 2 or more companies, and of all the facts therein stated: And provided, That any railroad bridge company, or any railroad tunnel company, which may be organized under this act to bridge or tunnel the Detroit river, or the St. Clair river, or any of the waters in the jurisdiction of this state, shall have a right to consolidate the stock, property and assets of said company with the stock, property and assets of any connecting railroad company or of any company organized or to be organized under the laws of this state, or which may be created under the laws of any adjacent state or country, to construct any such bridge or tunnel therewith, or to merge or be merged into any such other corporation, in the manner in this section above provided, upon such terms, conditions and agreements as may by the said corporations be deemed just and equitable: Provided, That every such bridge or tunnel shall be so constructed as not to be a material obstruction to navigation.

SEC. 30. Upon the approval by the interstate commerce commission or the Michigan public utilities commission, as the case may be, of any agreement of consolidation or merger provided for in the preceding section twenty-nine, a duplicate of said articles of agreement shall be filed in the office of the secretary of state; the said two or more corporations, parties to said agreement shall thenceforth be one corporation as provided in such agreement, to be known by the corporate name therein provided, and the details of such agreement shall be carried into effect as provided therein.

And all and singular the powers, rights and franchises of each and all of such two or more corporations, parties to such agreement, of a kind which would be possessed by a company organized under the provisions of this act as now existing or as hereafter amended, and all and singular their rights and interest in and to every species of property and things in action, shall be deemed to be transferred to and vested in, or to remain vested in, such new or surviving corporation, without any other deed or transfer; and such new or surviving corporation shall hold and enjoy the same, together with all the right of way, and all other rights of property, in the same manner and to the same intent and as effectually as the same were formerly held and enjoyed by said two or more corporations, parties to such agreement; and the titles and real estate acquired by any of said two or more corporations shall not be deemed to revert or be impaired because of anything in this act contained or anything done by virtue thereof: *Provided,* That all rights of creditors and all liens upon the property of any of said corporations, parties to the said agreement, shall be and hereby are preserved unimpaired, and the respective corporations shall be deemed to continue to exist so far as may be necessary to enforce the same: And *provided further,* That the debts, liabilities and duties of each and all of said companies, parties to said agreement shall thenceforth attach to such new or surviving corporation, and be enforceable against the same, to the same extent, and in the same manner as if such debts, liabilities and duties had been originally incurred by it.

APPENDIX C

VIRGINIA MERGER STATUTE

(Sections 3821-3822 of the Code of 1919 as last amended by the Acts of 1944; pages 7 and 528. Sections 3822-a and 3822-b, in regard to dissatisfied stockholders, appear at R. 175.)

SEC. 3821. *When merger or consolidation may be effected.*—Except as any merger or consolidation is prohibited by sub-section (e) of section thirty-eight hundred fifty-seven, and sub-section (e) of section thirty-eight hundred sixty-six, any corporation not under patronage or control of the State, organized or to be organized under any law or laws of this State, whether it be a corporation having capital stock or a non-stock corporation other than one organized for social purposes only, may merge or consolidate in the manner prescribed in section thirty-eight hundred twenty-two of the Code as amended into a single corporation with any other corporation organized for the purpose of carrying on the same or a similar business or for the same or similar purposes under the laws of this or any other state of the United States, or under the laws of the United States; and corporations organized for social purposes only may merge or consolidate in the same manner, except that the merger or consolidation of such corporations shall be by unanimous vote of the members by whatever name called having voting power at a meeting legally called for the purpose of considering and voting in person or by proxy on an agreement for merger or consolidation. Any such merged or consolidated corporation shall, upon the payment of a proper charter fee, thereby become a domestic corporation of this State and be subject to its laws, and to the jurisdiction of its courts, and may be either one of the merging or consolidating corporations, or a new corporation to be formed by means of the

merger or consolidation; and by virtue of this chapter, and the proceedings had pursuant thereto, the corporations shall be consolidated and merged, so that all property, rights, franchises, and privileges by law vested in each corporation so merged or consolidated shall be transferred to and vested in the corporation formed by the merger or consolidation.

In the case of corporations having no capital stock the provisions of this chapter prescribing procedure for the merger or consolidation of corporations shall be followed as far as applicable, and the directors, managers, trustees or members of the governing board however called may take the action required of the board of directors of stock corporations, and the members of the corporation such action as is required of stockholders, but non-stock corporations organized for social purposes only may merge or consolidate only by unanimous vote of the members of each of the constituent corporations. No dissatisfied member of a non-stock corporation shall be entitled to recover anything from the corporation on account of the merger or consolidation. (1902-3-4, p. 437; ch. 5, sec. 40; 1904, p. 91; 1944, p. 7.)

SEC. 3822. *Manner of consolidation or merger; recordation; when effective; issue of stock and bonds; when merger complete.*—(a) Such consolidation or merger shall be made in the following manner and under the conditions, provisions, restrictions, and with the powers following, that is to say: (1) The board of directors of the several corporations proposing to merge or consolidate may enter into a joint agreement under the corporate seals of their respective corporations for their merger or consolidation prescribing the terms and conditions thereof, the mode of carrying same into effect, the name of the new corporation (if it be proposed to form a new one), or of the merged or consolidated corporation, as the case may be; the number, names, and

places of residence of the directors and principal officers of the new or consolidated corporation (who shall hold their offices until their successors be chosen or appointed either according to law or according to the by-laws of the corporation); the aggregate principal amount and the rate of interest of the bonds, if any, and the number of shares of the capital stock, with the par value of each share proposed to be issued in connection with the merger or consolidation by the new or consolidated corporation, and if the capital stock is to be divided into classes, the classes thereof, with the terms on which issued; the manner of converting the capital stock of each of the merging or consolidating corporations into the stock or obligations of the new or consolidated corporation, and in case of the creation of a new corporation how and when the directors and principal officers to succeed those named in the agreement are to be chosen or appointed; together with all such other provisions and details as to the board of directors entering into the agreement seem necessary or convenient to perfect the proposed merger or consolidation; (2) The agreement shall be submitted to the stockholders of each of the merging or consolidating corporations separately, at a meeting called for the purpose of taking same into consideration; of the time, place, and general object, of which meeting due notice shall be given by publication at least six times a week, for two successive weeks, in a newspaper published in the place where the principal office in this State of the corporation is located, or having a general circulation therein, and by mailing a copy of the notice at least ten days prior to the meeting to the last known postoffice address of each of the stockholders of record; and at the meeting such agreement shall be considered, and a vote by ballot, in person or by proxy, shall be taken for the adoption or rejection thereof, each share entitling the holder thereof to one vote; and if a majority of

all the votes cast at each of such meetings be in favor of the agreement, consolidation, and merger, that fact shall be certified by the president or one of the vice-presidents of the corporation under the corporate seal, attested by the secretary, and the certificates, duly acknowledged by those signing the several certificates and attesting the several seals, before an officer authorized by the laws of this State to take acknowledgements of deeds, together with a copy of the agreement, shall be presented to the State Corporation Commission which shall ascertain and declare whether the applicants have, by complying with the requirements of the law, entitled themselves to the merger or consolidation applied for, and shall issue or refuse a certificate thereof accordingly.

(b). If it be issued the agreement and certificate, with the order thereon of the Commission, shall be forthwith admitted to record in the office of the Commission, certified to the clerk of the proper court, forwarded for recordation in his office and returned for lodgment and preservation in the office of the Commission, as in the case of original certificates of incorporation, or in the case of articles of association recorded only in the office of the Commission.

(c) When such certificate has been so admitted to record in the office of the Commission, the merger or consolidation shall be complete and the merged or consolidated corporation may proceed to carry out the details of the merger and consolidation according to the terms of the agreement and to transact and carry on the business for which it was formed; but no stock or bonds shall be issued by the merged or consolidated corporation until the provisions of section one hundred sixty-seven of the Constitution, so far as applicable thereto, have been complied with. (1902-3-4, p. 437; ch. 5, sec. 41; 1922, p. 625; 1944, p. 528.)

APPENDIX D

ARTICLE IV OF THE ARTICLES OF ASSOCIATION OF PERE MARQUETTE RAILWAY COMPANY.

(DEFINING THE TERMS OF THE CAPITAL STOCK)

The number of shares of which the stock shall consist is seven hundred seventy-six thousand, eight hundred forty-two (776,842), and said shares shall be of the amount of $100 each.

Said capital stock shall be divided into Prior Preference Stock to the amount of eleven million, two hundred thousand dollars ($11,200,000); Preferred Stock to the amount of twelve million, four hundred twenty-nine thousand dollars ($12,429,000); and Common Stock to the amount of fifty-four million, fifty-five thousand, two hundred dollars ($54,055,200).

Dividends upon the Prior Preference Stock, upon the Preferred Stock and upon the Common Stock shall be paid out of the net income for any fiscal year or the surplus of said corporation, but only when and as declared by the board of directors, and on such dates as may be fixed by the by-laws or as determined by said board.

Holders of the Prior Preference Stock shall be entitled to receive cumulative preferential dividends at the rate of five per cent. per annum from April 1, 1917, in priority to any dividends upon the Preferred Stock or upon the Common Stock, and no dividends shall be paid upon the Preferred Stock or upon the Common Stock in any fiscal year or declared or set apart for payment in any fiscal year unless all accumulated dividends upon the Prior Preference Stock for all previous fiscal years shall have been paid and full divi-

dends thereon for the current and all preceding dividend periods of such fiscal year shall have been paid or declared and set aside for payment in such fiscal year. The Prior Preference Stock shall not be entitled to any other or further dividends. The entire amount of the Prior Preference Stock, but not any part thereof less than all, shall be redeemable at par plus the cumulative dividends accrued and unpaid thereon on such notice as the board of directors of said corporation may determine at the time of issue. All dividends upon Prior Preference Stock called for redemption shall cease from and after the date fixed for the redemption thereof and specified in the notice calling such Prior Preference Stock for redemption. In the event of any liquidation, dissolution or winding up, whether voluntary or involuntary, of said corporation, the holders of the Prior Preference Stock shall be entitled to be paid in full out of the assets of said corporation the par amount of their shares and all accumulated dividends unpaid thereon before any amount shall be paid out of said assets to the holders of the Preferred Stock or of the Common Stock, but the holders of the Prior Preference Stock shall not be entitled to any other or further distribution of assets.

Holders of the Preferred Stock shall be entitled to receive preferential dividends at the rate of five per cent. per annum from April 1, 1917, in priority to any dividends upon the Common Stock. The Preferred Stock shall not be entitled to any other or further dividends. The dividends on the Preferred Stock shall be cumulative from and after January 1, 1919. No dividends shall be paid upon the Common Stock in any fiscal year or declared or set apart for payment in any fiscal year unless all accumulated dividends upon the Preferred Stock for all previous fiscal years or portions thereof from and after January 1, 1919, shall have been paid or de-

cleared and set aside for payment, nor unless full dividends upon the Preferred Stock for the current and all preceding dividend periods of such fiscal year shall have been paid or declared and set aside for payment in such fiscal year. The entire amount of the Preferred Stock, but not any part thereof less than all, shall be redeemable at par plus the cumulative dividends accrued and unpaid thereon on such notice as the board of directors of said corporation may determine at the time of issue. All dividends upon Preferred Stock called for redemption shall cease from and after the date fixed for the redemption thereof, and specified in the notice calling such Preferred Stock for redemption. In the event of any liquidation, dissolution or winding up, whether voluntary or involuntary, of said corporation, the holders of the Preferred Stock shall be entitled to be paid in full out of the assets of said corporation the par amount of their shares and all accumulated dividends from and after January 1, 1919, unpaid thereon before any amount shall be paid out of said assets to the holders of the Common Stock, but the holders of the Preferred Stock shall not be entitled to any other or further distribution of assets.

After all accumulated dividends upon the Prior Preference Stock and after all accumulated dividends from and after January 1, 1919, upon the Preferred Stock shall have been paid for all previous fiscal years, and after full dividends upon the Prior Preference Stock and upon the Preferred Stock for the current and all preceding dividend periods of the current fiscal year shall have been paid or declared and set aside for payment in such fiscal year, the holders of the Common Stock shall be entitled to receive all further amounts that may be distributed in that current dividend period of such fiscal year.

The capital stock of said corporation may from time to time be increased as may be then permitted by law, and such

increased stock may be wholly or partly Prior Preference Stock, Preferred Stock or Common Stock, or any other class of stock then authorized and permitted by law.

In addition to any requirements of law at the time in force, said corporation shall not, unless with the consent of the holders of all its outstanding stock, create any mortgage or deed of trust upon its property or any part thereof, except after there shall have been given at a meeting of the stockholders called for that purpose the consent of the holders of a majority of the whole amount of Prior Preference Stock outstanding, the consent of the holders of a majority of the whole amount of Preferred Stock outstanding, and the consent of the holders of a majority of such part of the Common Stock as shall be represented at such meeting, the holders of each class of stock voting separately.

Holders of Prior Preference Stock, of Preferred Stock and of Common Stock shall have the same right of subscription to any shares of stock of said corporation, whether Prior Preference, Preferred or Common, or stock of any other class, which said corporation may at any time issue or sell, in proportion to the respective amounts of Prior Preference Stock, Preferred Stock and Common Stock outstanding, and in all respects as if the entire outstanding stock of said corporation were all of one class.

APPENDIX E

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

SUPPLEMENTAL

CERTIFICATE OF NOTIFICATION TO THE INTERSTATE COMMERCE COMMISSION OF SECURITIES SOLD, PLEDGED, REPLEDGED, OR OTHERWISE DISPOSED OF, REQUIRED BY PARAGRAPH (5) OF SECTION 20a OF THE INTERSTATE COMMERCE ACT, INCLUDING OBLIGATIONS OF THE CARRIER AUTHENTICATED OR ISSUED BY TRUSTEES OR OTHERS

Cleveland, Ohio, December 18, 1947

The undersigned hereby certifies that within the 10 days next preceding the above date THE CHESAPEAKE AND OHIO RAILWAY COMPANY has disposed of the securities set forth and described below:

1. Description of securities:	3½% Convertible Preferred Stock of the par value of $100 per share and Common Stock of the par value of $25 per share of The Chesapeake and Ohio Railway Company.
2. Date of application for authority with respect to the securities:	March 5, 1946.
3. Interstate Commerce Commission's finance docket number assigned to application for authority:	Finance Docket No. 15228.
4. Date of the Commission's order authorizing the disposition of the securities:	April 1, 1947.
5. Date of prior certificate of notification (if any) in which the securities are set forth and described:	December 6, 1947.

6. Disposition of the securities:	
(a) Authenticated by registrar:	
(1) Date of authentication:	December 8 and 12, 1947.
(2) Date of delivery to carrier:	Not delivered to carrier; delivered to stockholders of Pere Marquette Railway Company, or to their representatives, by J. P. Morgan & Co. Incorporated, Exchange Agent.
(3) Par value or principal amount:	$20,615.00.
(b) Sold:	Not sold.
(c) Pledged or repledged:	None.
(d) Otherwise disposed of:	
(1) Date disposed of:	December 8 and 12, 1947.
(2) Par value or principal amount:	$20,615.00.
(3) To whom disposition was made:	
(4) Manner and purpose of disposition:	
(5) Conditions and terms of disposition:	

To stockholders of Pere Marquette Railway Company in exchange for stock of that company at the rate of one share of Preferred Stock and 1/3 of one share of Common Stock for each share of Pere Marquette 5% Cumulative Prior Preference Stock; 8/10 of one share of Preferred Stock and 4/10 of one share of Common Stock for each share of Pere Marquette 5% Cumulative Preferred Stock; and 1/2 of o... share of Common Stock for each share of Pere Marquette Common Stock. During the period December 8, 1947, to December 17, 1947, inclusive, no shares of Prior Preference Stock, 181 shares of Preferred Stock, and 346 shares of Common Stock of Pere Marquette Railway Company, were exchanged by stockholders for 144 full shares and

scrip certificates aggregating .80 shares of 3½% Convertible Preferred Stock, and 244 full shares and scrip certificates aggregating 1.40 full shares of Common Stock. From June 9, 1947, to December 17, 1947, both inclusive, 201,082 full shares and scrip certificates aggregating 56 shares of 3½% Convertible Preferred Stock, and 296,521 full shares and scrip certificates aggregating 549.6667 full shares of Common Stock, have been issued in exchange for 110,042 shares of Prior Preference Stock, 113,870 shares of Preferred Stock, and 429,684 shares of Common Stock of Pere Marquette Railway Company, leaving outstanding in the hands of the public 1,958 shares of Prior Preference Stock, 10,419 shares of Preferred Stock, and 20,765 shares of Common Stock of Pere Marquette Railway Company.

IN WITNESS WHEREOF The Chesapeake and Ohio Railway Company has caused its name to be hereunto subscribed by its Secretary and Treasurer and its corporate seal to be hereunto affixed this 18th day of December, 1947.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

By (Signed) H. F. LOHMEYER

(CORPORATE SEAL) *Secretary and Treasurer.*

VERIFICATION

STATE OF OHIO
COUNTY OF CUYAHOGA } ss.

H. F. LOHMEYER, being duly sworn, says that he is the Secretary and the Treasurer of The Chesapeake and Ohio Railway Company, and he deposes and says that the matters and facts set forth in the foregoing certificate are true to the best of his knowledge, information and belief.

Sworn to before me this 18th day of December, 1947. (Signed) H. F. LOHMEYER

(Signed) ALLAN G. LEJA
Notary Public. Allen G. Leja
My commission expires June 10, 1948 (NOTARIAL SEAL)

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 258

ALBERT E. SCHWABACHER, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION, APPELLEE

OPINIONS BELOW

The opinion of the specially constituted district court (R. 254–255) is reported in 72 F. Supp. 560. The report of the Interstate Commerce Commission (R. 5) will be found in 267 I. C. C. 207.

JURISDICTION

The final decree of the district court was entered on June 16, 1947 (R. 257). The petition for appeal was filed and allowed on July 22, 1947 (R. 257). Probable jurisdiction was noted on October 13, 1947 (R. 267). The jurisdiction of this Court rests on the Urgent Deficiencies Act of

October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1935, c. 229, 43 Stat. 936, 938 (28 U. S. C. 345).

QUESTION PRESENTED

Whether, in passing upon the agreement of merger here involved,—submitted to and approved by the several classes of stockholders in accordance with the enabling statutes of the respective States of incorporation of the two railroad companies involved—, the Commission was required, as a condition to its approval of the merger under the provisions of Section 5 (2–13), and Section 20a (1–11) of the Interstate Commerce Act, to adjudicate and enforce the claimed contractual rights, arising under State law, of dissenting stockholders as a separate and distinct class, notwithstanding that the Commission found, *inter alia*, that the terms and conditions of the merger as affecting the class of stockholders of which such dissenting group is a part were just and reasonable.[1]

[1] The complaint in the court below states the issue (R. 3): "Failure to include protection for plaintiffs as dissenting shareholders, as a distinct class created by the merger, is contrary to law and a direct violation of the Commission's statutory duty to impose just and reasonable conditions for the protection of all interests concerned."

Appellants in their Brief in Opposition to Motions to Affirm state the issue:

"The issue in this case is whether, in approving a privately formulated plan for the acquisition of the Pere Marquette

STATUTES INVOLVED

The pertinent statutory provisions involved are set forth in the Appendix hereto, *infra*, pp. 34–46.

STATEMENT

On March 8, 1946, the Chesapeake and Ohio Railway Company, the Pere Marquette Railway Company and Alleghany Corporation[2] filed their joint application to the Commission under section 5 of the Interstate Commerce Act for approval of the merger agreement, to be consummated under appropriate enabling statutes of the States of Virginia and Michigan, those being the respective states of incorporation of the two railroads.

Hearing was held during the period April 24–27, 1946.

Following the closing of the record and the filing of briefs, a proposed report was served

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Railroad by the Chesapeake & Ohio Railroad through the exchange of stock of the latter for that of the former, the Interstate Commerce Commission properly held itself to be *without* jurisdiction to determine whether the full priority of dissenting preferred shareholders in Pere Marquette had been satisfied in the exchange—despite the fact that the statute under which the Commission was acting expressly provides that its jurisdiction in such cases shall be not only 'exclusive' but 'plenary'.".

[2] Chesapeake controlled Pere Marquette through ownership of 47.74 percent of the total number of shares of all classes of the latter's outstanding stock. Alleghany, a non-carrier but subject to sections 20 (1–10), 20a (2–11) of the Interstate Commerce Act, controlled Chesapeake through ownership of 7.92 percent of the latter's common stock, its only class of stock outstanding (R. 9, 10).

upon the parties on October 29, 1946. On November 19, 1946, the appellants here asked leave to intervene and file exceptions to the proposed report. Leave was granted on November 21, 1946. Their exceptions were based upon the sole ground that the proposed report failed to accord them, as preferred stockholders, their asserted statutory and contractual rights claimed to have been preserved to them under the laws of the State of Michigan. On April 1, 1947, the Commission, Division 4, issued its report and order, here under consideration, approving the proposed merger and the issuance of securities in accordance with its terms (R. 5). On May 20, 1947, the Commission denied petitions for reconsideration (R. 68). The present suit followed.

There is no attack here upon the affirmative basic findings of the report or upon the ultimate finding that the terms and conditions of the proposed merger are just and reasonable and that the transaction will be in the public interest; that the issuance of securities and assumptions of indebtedness in carrying out the terms of the merger are compatible with the public interest and are necessary and appropriate for and consistent with the proper performance by Chesapeake of service to the public as a common carrier and will not impair its ability to perform that service and are reasonable and necessary for such purposes (R. 62, 63).

Appellants are owners of 2,100 shares of 5 percent Cumulative Preferred Stock of Pere Marquette. Their combined interests represent approximately 2 percent of the total outstanding stock of this class. They dissented from the terms and conditions of the proposed merger, not because the merger was not in the public interest or the treatment accorded the Pere Marquette preferred stockholders as a single class was not just and reasonable or because the public interest was in any way involved in their own treatment as a separate and distinct class of shareholders. They rested their case before the Commission, in the court below and now in this Court, on their assertion that they are entitled under the laws of the State of Michigan to certain contractual rights and that the Commission is the one and only forum in which such rights may be adjudicated and enforced; and that consequently the Commission's failure to adjudicate these claimed rights and make appropriate provision for their enforcement constituted a failure to perform its full statutory duty.

The Commission in passing upon this contention held that, having reached the factual conclusion that the terms and conditions proposed by the applicants were just and reasonable "performance in respect to stockholders is complete, in our opinion, when we make certain that all stockholders of the same class are to be treated

alike" (R. 54). The Commission went on to say that "Whether dissenting stockholders, as members of a class created by the merger are entitled to better treatment under their charter with Pere Marquette is a question not within our province to decide" (R. 54). The Commission further stated that its holding did not preclude the dissenting stockholders from settling their controversy with the railroads "through negotiation and litigation in the courts" (R. 54).

That the Commission was merely disclaiming its jurisdiction to pass upon claims of contractual rights unrelated to the public interest and not attempting to foreclose them by its finding that the treatment of the preferred stockholders was just and reasonable, is demonstrated by its express recognition of the possibility of court proceedings to adjudicate claims of dissenting shareholders (R. 54). Its concern was the effect upon the merger from the standpoint of public interest of the ultimate settlement of such claims. Consequently it explored the various bases upon which such claims might be settled (R. 55) and arrived at the conclusion, taking into consideration the cash expenditures that might result from such settlements, "that consummation of the merger will not involve a burden of excessive expenditure" (R. 56).

The court below sustained the Commission in its treatment of appellants' contentions. It stated (R. 255):

> As we read the opinion of the Commission it did not attempt to pass upon what rights, if any, dissenting stockholders might have under the laws of the several states. It specifically left Pere Marquette and Chesapeake and Ohio "free to settle controversies with dissenting stockholders through negotiation and litigation in the courts." We adopt a like course.

Appellants challenge the court's finding that the Commission's ultimate conclusion of the justness and reasonableness of the merger was based upon substantial evidence because the evidence upon which the Commission relied was not before the court (Appellants' Brief, p. 10). Aside from the irrelevance of this finding to the issue here and appellants' failure to question the fairness of the merger agreement at any stage of this proceeding, the statement is ridiculous. As appellants well know the court was obligated to accept the Commission conclusion when appellants did not see fit to introduce the record before the Commission in evidence.

ARGUMENT[1]

I. Appellants have evaded the true issue in this case

Appellants in their Brief have evaded the real issue in this appeal. They premise their whole argument upon the assumption that their asserted

[1] Due to the narrowness of the issue here a Summary of Argument is thought unnecessary.

contractual rights under Michigan law to receive the par value of their stock plus accumulated dividends is not open to question. Thus at the very start in their statement of "Question Presented" they challenge the Commission's failure "to take jurisdiction of an issue as to impairment of preferred shareholders' rights" by the terms of the merger. They say the Commission "refused to recognize the rights of appellants, as holders of preferred stock in the railroad corporation dissolved by the merger, to equities arising under its corporate charter by virtue of accrued but unpaid dividends" (Appellants' Brief, p. 2). Of course if their right to par value of their stock plus accrued dividends had already been incontestably established the payment of such an amount by Chesapeake as a liquidated liability of Pere Marquette would have been obligatory under the terms of the merger agreement which the Commission approved. Consequently there would be no controversy here. But Appellants adroitly obscure this obvious infirmity in their argument by recourse to the phrase "exclusive and plenary" in sections 5 (11) and 20a at the same time carefully avoiding reference to the fact that they thereby seek to have the Commission *judicially* determine the nature and extent of *private contractual rights* and use its authority to impose conditions upon its approval of the merger—which under the statute must be based upon the public interest which will be served thereby—in order

to enforce private contractual rights notwithstanding such adjudication would have no bearing upon the issue of public interest.

Furthermore Appellants attempt to fortify their position by reaching out and bringing into their own field of claimed right all the preferred stockholders and attempting to show that because the Commission failed to recognize the legality of the dissenters' claim all preferred stockholders were not treated justly and reasonably. Thus Appellants say that the Commission failed to deal with the "cumulative prior equities" of the Pere Marquette preferred stock of either "the assenters, abstainers, or dissenters" (Appellants' Brief, p. 20). The fallacy of this contention lies in the fact that the Commission would have no latitude in determining upon a factual basis what would constitute fair treatment of the preferred stockholders. It would have to recognize asserted legal rights as the *sole* measure of fair treatment. Thus the power of the Commission to prescribe terms and conditions "as it shall find to be just and reasonable would be completely nullified.

Finally Appellants seek to justify their contention that the Commission failed to perform its full statutory duty by analogy to its duty in reorganization cases under section 77 of the Bankruptcy Act and to the duty of the Security and Exchange Commission under the Public Utility Holding Company Act. They also accuse the Commission of inconsistency in its treatment of

dissenting stockholders in the instant case and the protection it has accorded minority interests in other section 5 (2) cases. But there is an inherent difference between these classes of cases and the instant one. In bankruptcy reorganization the Commission functions as an adjunct of the Court under a special statute enacted under the federal bankruptcy power and exercises judicial powers specially conferred for the purpose of reorganization. The reorganization plan that is finally approved, if it satisfies all the legal requirements of a valid plan, must be accepted by the stockholders even though it may be distasteful to some. There is no choice. So, too, in a simplification of the capital structure under the Public Utility Holding Company. In an acquisition of control through stock purchase or in the lease of operating rights the approval of the Commission is final and binding upon the minority stock interests even though they voted against the proposal. In such cases, regardless of the degree of public interest that may be involved in their protection, equitable considerations demand that they be treated justly. But in a merger case there is no such compulsion upon dissenting minorities. They are given the choice of assenting to the terms of the merger or seeking redress under state law. Appellants here rest on the claim that Michigan law entitled them to recovery for the loss consequent to their refusal to accept the terms of exchange for their stock.

II. The Commission is not the proper forum for the adjudication of private contractual rights

There is nothing in the language or evolution of Section 5 of the Interstate Commerce Act nor in the legislative history of its several amendments which lends support to the argument that the Commission, in dealing with the consolidations and mergers embraced by those provisions, has succeeded the courts in the adjudication of contractual rights of parties affected thereby. The words "exclusive and plenary" do not warrant such an interpretation.

Appellants' whole argument is pitched on the assertion that the phrase of Section 5 (11), "The authority conferred by this section shall be exclusive and plenary," gave them the statutory right to have the Commission adjudicate the nature and extent of their "full prior equity" as dissenting stockholders and then to insist upon terms and conditions which would fully satisfy their claims under the charter provisions and Michigan law.

Appellants make no attempt to demonstrate through reference to legislative history or any decision of this Court involving merger approval that the "exclusive and plenary" provision of Section 5 (11) was intended to invest the Commission with authority to adjudicate private rights as such. They *assume* this to be the case throughout their brief. But this is the very thing in issue. It is our contention that from the

express terms of the statute, its legislative history and the decided cases that the phrase, "exclusive and plenary" was enacted and designed to make the Commission's authority absolute and complete within the powers conferred by other provisions of the act and was not intended to vitiate such other provisions by granting the Commission carte blanche authority to act on any subject without reference to its relationship to the public purposes of the Act.

Paragraph (2) (a) provides that it shall be lawful, with the approval and authorization of the Commission for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation. Subparagraph (b) provides for application to the Commission for approval of such proposed transaction, notice to the Governor of each State in which any part of the properties of the carriers involved may be located, and to interested parties, and public hearing in case of railroads. Authority is given the Commission to approve the transaction, upon terms and conditions and with modifications found to be just and reasonable, if it shall find (a) the transaction is within the scope of subparagraph (a) and will be consistent with the public interest. Subparagraph (c) provides specific considerations to which the Commission shall give weight, namely (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect

upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

In these provisions and in the subsequent paragraphs dealing with indirect and non-carrier acquisitions of control the public interest inherent in the preservation of adequate and efficient transportation service is the dominant note. In fact the single divergence is the provision for fair and equitable treatment of railroad employees and even there the public interest is present. See *Interstate Commerce Commission* v. *Railway Labor Ass'n*, 315 U. S. 373.

Plainly the words "exclusive and plenary" can only operate within the scope of the authority granted. The Commission's power is supreme in that field, namely, in the control of the terms of proposed mergers in so far as they affect adequate, economical and efficient service and sound economic conditions in transportation. Only to that extent can be read a Congressional intent to supplant state laws. This is demonstrated by paragraph 11 itself which not only preserves applicable State law in respect to required assent of shareholders to the merger or consolidation but provides relief from the operation of all restraints, limitations and prohibitions of State and Federal laws only "insofar as may be necessary

to enable them [carriers] to carry into effect the transaction so approved or provided in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction." And finally this paragraph provides that nothing in section 5 shall be construed to create a federal corporation but any power granted by the section to any carrier shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

Certainly it cannot be said that the authority vested in the Commission under Section 5 is sufficient to set aside statutory procedures to effect mergers or to change or modify such machinery. It is only when state law presents an obstacle to effectuating a merger which the Commission finds to be in the public interest and upon just and reasonable terms and conditions, that this statute gives the enabling power.

It follows that state law remains effective, whether it be to govern the corporate procedure or to provide a means of paying off non-assenting shareholders, and the Commission's authority does permit it to set aside these laws.

In this case the Commission has rightly interpreted the words, "exclusive and plenary" as relieving it from the operation of any state or federal laws which would interfere with the exercise

of such authority as it finds necessary to exert in approving acquisitions, mergers, etc., rather than an attempt by Congress to define the *scope* of what matters it should pass upon. If this were not so there would have been no purpose in the enactment of subparagraphs (c), (d), (e) and of section 5 (2)—provisions which do specify subjects which the Commission must consider in approving the terms and conditions of merger and acquisition agreements. Significantly, although these subparagraphs specify that certain terms and conditions shall be required by the Commission in approving mergers, no conditions are inserted with respect to stockholders' rights. Moreover the conditions which are enumerated are shown to have definite relation to the public interest. Accordingly the scope of what it should consider other than as expressly provided by subparagraphs (b)–(f) is left to the Commission's discretion to be guided by the national transportation policy.

(a) There is nothing in the legislative history of Section 5 (2-11) or of its prior enactments which support the interpretation placed on those provisions by Appellant

The Transportation Act of 1920 first gave the Commission power to approve consolidations and mergers and removed necessity for obtaining State approval. At the same time the Commission was given control over stock and bond issues of railroads. In connection with the latter

the phrase "exclusive and plenary" was employed for the first time. The new section 20a[4] provided for Commission approval of the issuance of securities or the assumption of indebtedness upon a finding that such issue or assumption, (a) is for some lawful object within the carriers corporate purposes and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose. Subparagraph (7) then provides that "The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein."

The consolidation provisions of the 1920 Act required the Commission by paragraph (4) to prepare and adopt a plan for the consolidation of the railway properties of the United States. It also permitted voluntary consolidations of railroads in one corporation for ownership, management and operation provided the proposed plan was in harmony and furtherance of the complete plan of consolidation mentioned in paragraph (3), and received the Commission's approval. The

[4] Transportation Act, 1920, Section 439, 41 Stat. 494.

Commission's approval had to be predicated upon a finding that the public interest would be promoted by the consolidation. It could prescribe terms and conditions and modifications. It then provided that such consolidations could be effected "notwithstanding the law of any State or the decision or order of any State authority." By paragraph (8) the carriers affected by the approval were relieved from the operation of the "antitrust" laws, State and Federal, and of "all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section."

There is nothing in the legislative history of the 1920 Act which indicates a purpose to enlarge the jurisdiction of the Commission beyond that which would give validity and protection to consolidation in furtherance of the nationwide plan of consolidation which the Commission was required to promulgate. So, too, the legislative history gives no specific explanation of the words "exclusive and plenary" as used in section 20a. But since that section dealt with transactions having only prospective effect the question of adjustment of existing private contractual rights, such as are necessarily involved in a merger, was not present.

Section 5 (a) was amended by the Emergency Railroad Transportation Act of June 16, 1933,

48 Stat. 217. The only change of pertinence here was the incorporating of the former provisions relating to acquisitions of control not involving consolidations or mergers (Section 5 (2)) into paragraph (4) retaining the same standards for approval.

The legislative history of the Transportation Act, 1940, does not afford any affirmative information for the adopting of the Section 20a language—"exclusive and plenary"—into the revised Section 5. The principle concern in reference to that section of the act as expressed in the Committee hearings, the Committee of Three, Committee of Six reports, and in the reports of the Congressional Committee was the question of relieving the Commission from the duty of promulgating nation-wide systems of railroad consolidation and making all consolidations and merger voluntary upon the carriers initiative subject to Commission approval.[1] As to other substantive changes or enlargement of the Commission's powers in passing upon proposed mergers the record is silent. But this paucity of legislative

[1] Report of Commissioners Splawn, Mahaffie and Eastman, April 11, 1938, transmitted by the President to Interstate and Foreign Commerce Committee; Report of Committee of Six, December 1938; letter from Commissioner Eastman transmitting report on H. R. 2533 and 4307, with recommendations of Interstate Commerce Committee of Three and Committee of Six, March 20, 1939; Report No. 433, 76th Cong. 1st Sess., Committee on Interstate Commerce, S. 2009, May 16, 1939; Report No. 1217, House Committee on Interstate and Foreign Commerce, July 18, 1939.

history is not without significance. It is not to be presumed that Congress by the mere statement that "the authority conferred by this section shall be exclusive and plenary," intended to invest the Commission with jurisdiction to adjudicate the infinite variety of legal issues that might arise in connection with mergers to the exclusion of all judicial process. Aside from the constitutional problems which would arise such drastic delegation of power to an administrative body is not to be read out of three words, "exclusive and plenary." Rather the phrase operates only within the delegated authority as defined by other provisions of Section 5.

This interpretation of subparagraph (11) in connection with the Commission's power to attach just and reasonable terms and conditions to its approval conforms to the principles of statutory construction of the Commission's powers under the Interstate Commerce Act heretofore enunciated by this Court; namely, that the Commission is an agency of limited powers and authority; that, while Congress may delegate to the Commission certain of its own powers and authority, the exercise of such delegation does not extend beyond the expressed enactment or its fair inferences; and that important powers should not be read into the Act by implication but should be conferred in clear and unmistakable terms. *Thompson* v. *U. S.*, 246 U. S. 547; *U. S.* v. *Penn-*

sylvania R. Co., 242 U. S. 208; and *I. C. C.* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479.

III. The Commission has consistently disclaimed authority in Section 5 proceedings to pass upon private disputes arising out of contracts, but has left those matters to settlement by the parties themselves or by the courts

It has always been the Commission's practice in Section 5 proceedings not to involve itself in private disputes between stockholders or others arising from contractual arrangements. This has been true both prior and subsequent to the Transportation Act of 1940. *Raymond Bros.—Purchase—Berzel* (1938), 15 M. C. C. 477, 478; *Yellow Cab Transit Co.—Merger—Bryan Motor Freight Lines* (1939), 25 M. C. C. 543, 546; *Sullivan—Purchase—Service Freight Line, Inc.* (1942), 38 M. C. C. 621; *St. Johns River Line—Purchase—Browns Motor Freight* (1942), 38 M. C. C. 99, 102, 103; *Lancaster Transp. Co.—Purchase—York—Buffalo M. Exp.* (1944), 39 M. C. C. 579, 583; *Jessup—Control—Safeway Trails* (1943), 39 M. C. C. 233, 241; *Carolina M. Exp. Lines—Lease and Purchase—Reed* (1946), 40 M. C. C. 405, 407.*

Appellants rely on the fact that in other Section 5 proceedings the Commission has insisted upon

*Such administrative construction of its jurisdiction should be persuasive even if the construction should be regarded as "nicely balanced." *Switchmen's Union* v. *Mediation Board*, 135 F. (2d) 785, 795; *U. S.* v. *Jackson*, 280 U. S. 183, 193; *L. & N. R. G.* v. *U. S.*, 282 U. S. 740, 757; *Logan* v. *Davis*, 233 U. S. 613.

the submission of terms and conditions which will protect the interests of minority stockholders. See *Nickel Plate Unification*, 105 I. C. C. 425, 443–449; *Unification of Southwestern Lines*, 124 I. C. C. 401, 432–434; *New York Central Unification*, 150 I. C. C. 278, 320; *Denver & St. L. Ry. Co.—Control*, 252 I. C. C. 153, 195. Where the Commission does so, however, it is because such protection is necessary and incidental to its determination of the public interest. To this extent the right of the Commission to protect the interests of minority stockholders has been judicially recognized. *Berg* v. *Cincinnati, N. & C. Ry. Co.*, 56 F. Supp. 842, 848 (E. D. Ky., 1944); *Cleveland, C. C. & St. L. R. Co.* v. *Jackson*, 22 F. (2d) 509, 510, 511 (C. C. A. 6th, 1927). Compare *Otis & Co.* v. *Pennsylvania R. Co.*, 61 F. Supp. 905, 909, 910 (E. D. Pa., 1945).

It will be noted that the Commission cases cited are all acquisition proceedings as distinguished from consolidation and merger cases. In the latter, single ownership is created and separate ownership ceases. In the former, however, the acquired railroad continues to exist. Because of this fact the protection of minority stockholders carries with it a concomitant protection of the public interest in adequate and efficient transportation service. The Commission points this out in *Unification of Southwestern Lines, supra*, p. 433.

But the protection of the interests of minority stockholders upon a factual finding that they will

be accorded fair and equitable treatment is far removed from adjudicating the contractual right of dissenters and enforcing such rights under the power to annex just and reasonable conditions to the approval. The Commission has never provided separate treatment for dissenting stockholders as such apart from the class of stockholders to which they belong.

In the instant case the Commission stated in its report that because "the Chesapeake & Ohio, as controlling stockholder of the Pere Marquette, has an interest in the proposed merger adverse to the minority" the terms and conditions proposed "compel close scrutiny" (R. 54). The Commission there went on to say that it had undertaken such close scrutiny and had reached the conclusion that the terms and conditions proposed were just and reasonable (R. 54). Having reached that conclusion and making certain "that all stockholders of the same class are to be treated alike," the Commission regarded its duty as to stockholders as completed and left to the courts the question as to whether dissenting stockholders were entitled to better treatment in satisfaction of a contractual obligation due them from Pere Marquette.

IV. The decided cases confirm the Commission in its interpretation of its powers under Section 5 (2) in respect to the enforcement of private rights

This Court has held that the Interstate Commerce Commission is without power to pass upon

private rights which are neither dependent upon or ancillary to the exercise of its statutory authority. *Cleveland, C., C. & St. L. R. Co. v. U. S.*, 275 U. S. 404; *Pittsburgh & West. Va. R. Co. v. U. S.*, 281 U. S. 479; *Claiborne-Annapolis Ferry Co. v. U. S.*, 285 U. S. 382.

The principle enunciated by this Court in *N. Y. Central Securities Co. v. U. S.*, 287 U. S. 12, 27, 28 (1932), is applicable here notwithstanding appellants have given it the dignity of a footnote citation (Appellants' Brief, p. 25, note). There one of the grounds urged for setting aside an order of the Commission, approving a proposed lease of one railroad by another and the assumption of liability by the lessor of certain securities of the lessee, was that the lease was in violation of the laws of Ohio. To this contention this Court said:

> The question of the right of a State of incorporation, in a direct proceeding, to challenge the leases as *ultra vires* is not before us. See *Cleveland, Cincinnati, C. & St. Louis Ry. Co. v. United States*, 275 U. S. 404, 414. The order of the Commission under § 5 (2) is permissive, not mandatory. There is no warrant for concluding that the Congress intended to fetter the exercise of the Commission's authority by requiring that the Commission before making its order must determine whether the acquisition is within the corporate powers of the carrier under state laws.

In the same case the lower court had disposed of this issue as follows (*N. Y. Central Securities Corp.* v. *U. S.*, 54 F. (2d) 122, 129):

> The order of the Commission are further attacked on the ground that the leases as authorized are invalid under the law of Ohio. * * * Plaintiff contends that the approval of the lease under section 5 (2) cannot supply the lack of power in the corporation to make such a lease; and that the approval of the assumption of security obligations under section 20a is beyond the power of the Commission because of the express statutory limitation that the assumption be "within its corporate purposes." The first objection is, in substance, that it was *ultra vires* the corporation to execute these leases. While the fact that the order was permissive rather than mandatory does not deprive the court of jurisdiction in this proceeding (*Chicago Junction Case*, 264 U. S. 258, 44 S. Ct. 317, 68 L. Ed. 667), the attack based upon the state law limitation of corporate power has no proper place in a suit to annul the order. *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U. S. 479, 488, 50 S. Ct. 378, 74 L. Ed. 980, and cf. *Cleveland etc. Ry.* v. *United States*, 275 U. S. 404, 48 S. Ct. 189, 72 L. Ed. 338. The controversy as such is between the corporation and the minority stockholders.

These decisions not only recognize that legal rights under state laws are not to be enforced by

the Commission but that the "exclusive and plenary" authority conferred upon the Commission under Section 20a is inadequate to that end.

In *Missouri Pac. R. Co.* v. *U. S.*, 4 F. Supp. 449 (D. C. E. D. Ky. 1933) affirmed 293 U. S. 524, the Commission had approved the acquisition of stock control of the Cotton Belt Railroad by the Southern Pacific under section 5 (2). Suit to set aside this approval was brought by the Missouri Pacific and one of the contentions made by plaintiff was that in arriving at just and reasonable terms and conditions of its approval the Commission should have determined what rights the plaintiff had under an existing agreement between it and the Southern Pacific. On this point the Commission had said (*St. L. S. W. R. Co. Control*, 180 I. C. C. 175, 203):

> Any order that we may issue in this proceeding authorizing the acquisition of control as sought must be based upon a finding that such acquisition of control is in the public interest. It is not within our province to construe the Gould-Huntington Agreement or adjudicate the rights of the parties thereunder. The point here at issue is not whether the Gould-Huntington Agreement is in the public interest, but whether the acquisition of control as sought is in the public interest. The determination of the status of the parties under this Agreement rests with the courts.

On the same point the District Court after reviewing applicable cases held (p. 456):

> These cases establish not only that the Interstate Commerce Commission, in determining whether it will exercise a power conferred or perform a duty imposed upon it, has no power to take into consideration collateral matters, such as private rights, but also that the courts in an attack made upon its order have no power to consider same.

Two cases decided after the enactment of the Transportation Act of 1940 sustain the Commission's interpretation of its powers. *Watson Bros. Transp. Co.* v. *Jaffa*, 143 F. (2d) 340 (C. C. A. 8th, 1944), and *Otis & Co.* v. *Penna. R. Co.*, 61 F. Supp. 905 (E. D. Pa., 1945), affirmed 155 F. (2d) 522 (C. C. A. 3d, 1946).

In the *Watson Bros.* case the court considered its jurisdiction to review a suit for specific performance involving a lease of certain motor carrier operating rights. The Commission had approved a transfer to plaintiff of such rights under Section 5 (2). Defendant Jaffa thereafter refused to carry out his agreement with plaintiff. The lower court dismissed the complaint. The Circuit Court in reversing the court below considered, inter alia, the claim that the subject matter of the dispute was for the Commission

to determine in the first instance. It said (pp. 345-346):

> Very broad and comprehensive powers are conferred upon the Interstate Commerce Commission in all matters of interstate transportation, and in the exercise of its power to grant or to deny its approval to applicants for authority to operate particular interstate trucking routes it undoubtedly may hear and determine disputes between rival claimants asserting the right to carry on the same operation. In such disputes the public interest is paramount and it is for the Commission to identify and to protect the public interest in the first instance. As shown by the pleadings in this case the Commission determined after hearing that the transaction between Watson Bros., Inc., and Jaffa would be consistent with the public interest, and the transaction was approved, but the Commission prescribed conditions upon which Watson Bros., Inc., were authorized to operate. It preserved the public interest by permitting temporary operation of the routes in question by Watson Bros., Inc., and thereafter by permitting temporary operation thereof by Holdcroft.
>
> But the Commission remains an administrative board, exercising administrative power, and is not a court, and has no judicial power, although it has and exercises a quasi judicial power. 15 C. J. S.,

Commerce, § 141, p. 501. In the first volume of its reports, the Commission declared "The power to enforce contracts is not one which has been confided to us", *Traders, etc.* v. *Philadelphia, etc., Co.*, 1 I. C. C. 122, at page 131, and although the wide extension and multiplication of its duties have required it to perform many functions in the protection of the public interest in transportation which were not then foreseen, still its further expression in the same case retains its force, viz, "If petitioner has contracts * * * and if in any of the matters related in this evidence it has been injured and wronged by the defendants, there are courts provided by law having jurisdiction to hear and determine controversies of that character." We need not decide that the Commission could never, in any form of proceeding before it, be required to determine the dispute between the parties here concerning the duty of Jaffa towards Watson Bros., Inc., nor need we inquire particularly into the means of compulsion or want of them on the part of the Commission.

In the *Otis* case action was brought by Otis, a stockholder, of the Pennsylvania Railroad, alleging wrongful action by defendants in connection with the sale of certain bonds of the railroad. Among other defenses was the claim that the jurisdiction of the court was excluded because of the fact that the same issues had been presented to and decided by the Interstate Commerce Com-

mission under section 20a. In connection with this defense the court held (pp. 909-910):

> As to the defendants' res adjudicata defense, it may be noted at once that that theory was rejected by the United States Supreme Court in the case of *Pittsburgh & W. Va. Ry. Co.* v. *United States*, 1930, 281 U. S. 479, 50 S. Ct. 378, 74 L. Ed. 980. There, a minority stockholder intervened in a Commission proceeding involving the establishing of a union passenger station as Cleveland, and alleged, inter alia, that the contracts by the Wheeling & Lake Erie Ry. Co. were made in violation of the law of Ohio, the Wheeling directors did not give Wheeling the benefit of unbiased judgment, adequate and not the best obtainable. 281 and the price for Wheeling's site was in-transaction and the stockholder sought an injunction under the Urgent Deficiencies Act, 1913. 38 Stat. 220, 28 U. S. C. A. § 47. [Court's opinion garbled in report.] On direct review, the Supreme Court said, 281 U. S. at page 488, 50 S. Ct. at page 381, 74 L. Ed. 980:
>
> "Second. The prayer that the contemplated action of the Wheeling should be enjoined because its directors hold office illegally, are faithless to their trust, are acting in violation of the rights of stockholders under the Ohio law, and, hence, that the Wheeling could not legally exercise the authority granted to it by the Commission, was not properly joined in this suit and is not subject to review in this

Court on a direct appeal. An application for such relief may not be included in a bill under the Urgent Deficiencies Act to set aside an order of the Interstate Commerce Commission.' (Citing cases.) *It is neither ancillary to nor dependent upon the judgment as to the order. Relief of that character may be had only in a suit invoking the plenary equity jurisdiction of the District Court.* Such a suit would be heard in ordinary course by a single judge; and it would be appealable only to the Circuit Court of Appeals." [Emphasis supplied.]

The Supreme Court thereupon dismissed that part of the bill without prejudice. See also, *New York Central Securities Corporation* v. *United States*, 1932, 287 U. S. 12, 28, 29, 53 S. Ct. 45, 77 L. Ed. 138, the final decision in a series of actions beginning with *Cleveland, C., C. & St. L. Ry. Co.* v. *Jackson*, 6 Cir., 1927, 22 F. 2d 509, on which the defendants rest heavily. Since an intervening minority stockholder is not, in an injunction proceeding entitled to judicial review under the Urgent Deficiencies Act on questions such as breach of fiduciary duty, and since such questions are not "ancillary to nor dependent upon the judgment as to the order," it follows that the plaintiff here has properly sought to enforce its rights in this action, and that the proceedings before the Interstate Commerce Commission are not res adjudicata.

See, *Casey* v. *Woodruff*, *Sup.*, 1944, 49 N. Y. S. 2d 625, 640–642.

The Commission, under the statutory authority here involved, Act Feb. 28, 1920, 41 Stat. 494, 49 U. S. C. A. § 20a, does not determine private rights. In *Casey* v. *Woodruff*, supra, a case strikingly similar to the present controversy, Justice Shientag, in a well considered and authoritative opinion, stated, 49 N. Y. S. 2d at page 642:

"In formulating plans for the issuance and sale of the securities of a railroad, the board of directors necessarily must consider the public interest because the railroad is engaged in public service. Obviously it would be futile to propose a security issue which the Commission would be bound to disapprove as not 'compatible with public interest' or with the proper performance by it of service to the public. § 20a. To summarize what has been said on this point, it is clear that in determining that the proposed issue of Series D bonds was improvident and unwise the Commission, whether its action was based wholly or in part on the public interests, did substitute its own judgment for that of the directors. It did not, however, purport to pass upon the personal liability of the directors for alleged breach of fiduciary duty, nor did it have the slightest basis of jurisdiction for that purpose."

These cases, we submit, support the Commission's views in the instant case that the de-

termination of rights asserted to exist by virtue of contract is for the courts and not the Commission.

V. Practical considerations deny the broad interpretation which appellants would give to Section 5 (2-11)

The full import of appellants' argument is to invest the Commission with complete control over every phase of carrier consolidations and mergers irrespective of whether or not the issues presented bear any relation to the public interest. If private rights are to be adjudicated by the Commission it is difficult to see at what point, if any, judicial inquiry may step in. Must all debts, claims, liabilities, and obligations be determined by the Commission before it has completed its statutory duty? Will it require the Commission to interpret and administer the laws of the forty-eight different States? Obviously the Commission is neither competent nor equipped to undertake such a gigantic burden.

CONCLUSION

In this case the Commission has attempted to deal fairly with *all stockholders* involved in the merger. It stated in its report that close scrutiny of the terms and conditions proposed was required because of the fact that Chesapeake, as owner of the controlling interest in Pere Marquette, had an interest in the proposed merger adverse to the interests of the minority stock-

holders. It specifically considered the very claim which appellants asserts that because its jurisdiction is "exclusive and plenary" it must consider and determine the contractual rights of the dissenting stockholders. But it took the view that the criterion to be applied in its disposition of matters under Secton 5 was the controlling public interest and that in exercising its authority it was to be guided primarily by consideration for "adequacy of transportation service, its essential conditions of economy and efficiency and appropriate provision and best use of transportation facilities" (*N. Y. Central Securities Corp.* v. *U. S., supra*).

We respectfully submit that the judgment and decree of the court below should be affirmed.

Respectfully submitted.

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SEC. 5. (1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this part, it shall be unlawful for any common carrier subject to this part, part II, or part III to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided,* That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: *Provided further,* That any contract, agreement, or combination to which any common

carrier by water subject to part III is a party, relating to the pooling or division of traffic, service, or earnings, or any portion thereof, lawfully existing on the date this paragraph as amended takes effect, if filed with the Commission within six months after such date, shall continue to be lawful except to the extent that the Commission, after hearing upon application or upon its own initiative, may find and by order declare that such contract, agreement, or combination is not in the interest of better service to the public or of economy in operation, or that it will unduly restrain competition.

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in

or joint use of, any railroad line or lines owned or operated by any other such carrier and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this part, or any person which is controlled by, such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order

unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result

in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provision of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

(3) Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to

any carrier involved in such acquisition of control: Section 20 (1) to (10), inclusive, of this part, sections 204 (a) (1) and (2) and 220 of part II; and section 313 of part III (which relate to reports, accounts, and so forth, of carriers), and section 20a (2) to (11), inclusive, of this part, and section 214 of part II (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a of this part and of section 214 of part II, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of

this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

(5) For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and person affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

(6) For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or

companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

(7) The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this part; and with respect to any violation of paragraphs (2) to (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to this part shall apply to such a violation by any other person.

(8) The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.

(9) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate.

(10) Nothing in this section shall be construed to require the approval or authorization of the Commission in the case of a transaction within the scope of paragraph (2) where the only parties to the transaction are motor carriers subject to part II (but not including a motor carrier controlled by or affiliated with a carrier as defined in section 1 (3)), and where the aggregate number of motor vehicles owned, leased, controlled, or operated by such parties, for purposes of transportation subject to part II, does not exceed twenty.

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or

franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transactions so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

SEC. 20a. (1) That as used in this section the term "carrier" means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this part, or any corporation organized for the purpose of engaging in transportation by railroad subject to this part.

(2) From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capi-

tal stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

(3) The Commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by

any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of the foregoing paragraph (2).

(6) Upon receipt of any such application for authority the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the Commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceeding. The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority.

(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein.

(8) Nothing herein shall be construed to imply any guaranty or obligation as to such securities on the part of the United States.

(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if is-

sued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization. * * *

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Frankfurter J. pp 6, 7.

SUPREME COURT OF THE UNITED STATES

No. 258.—October Term, 1947.

Albert E. Schwabacher, Albert E. Schwabacher, Jr., James M. Schwabacher et al., Appellants, v. The United States of America, Interstate Commerce Commission et al.	Appeal From the District Court of the United States for the Eastern District of Virginia.

[May 3, 1948.]

Mr. Justice Jackson delivered the opinion of the Court.

"This controversy grows out of the voluntary merger of Chesapeake & Ohio Railway Company and Pere Marquette Railway Company, which companies, together with Alleghany Corporation, sought approval by the Interstate Commerce Commission." Pere Marquette is incorporated under the laws of Michigan, while Chesapeake & Ohio is chartered by Virginia. Chesapeake & Ohio acquired and for some years exercised active control of Pere Marquette, whose properties and operations complement rather than compete with those of Chesapeake & Ohio. Late in 1945 merger proceedings were commenced under enabling statutes of the two states and were consummated with approval of considerably more than the number of shares made necessary by statutes of the respective states. The Interstate Commerce Commission found, and there is no attack upon the findings, that the public interest is served by merger and unification of these properties and operations. The Commission also concluded that the plan as a whole, and as applied to each group of shareholders, is just and reasonable, and there is no attack upon this conclusion except that by the appellants which is treated fully herein. Consequently, details of the plan are of little importance to this litigation.

Appellants are owners of 2,100 shares of $100 par 5% cumulative preferred stock of Pere Marquette. Their interests aggregate a little less than 2% of the outstanding stock of this class. Dividends on this stock have been unpaid since 1931 and, as of the commencement of this controversy, were in arrears in the sum of $72.50 per share, an amount that is increasing with time. The Pere Marquette charter provides for full payment of the stock at par, plus accrued unpaid dividends, "in the event of dissolution, liquidation, or winding up of the company, voluntary or involuntary . . . before any amounts are paid to holders of the . . . common stock." The appellants contend that the merger hereinafter described terminates the corporate existence and, under this clause as construed by Michigan law, amounts to a "winding up." They insist that since the merger makes provision for some compensation to common stockholders these appellants have the right, under Michigan law, to have their shares recognized on the basis of at least $172.50 each. The Commission found the market value per share ranged, at different times, from $87 to $99, while the merger terms give stocks in exchange which would have realized about $90 and $111 per share on the same dates. Appellants dissented from the merger, but Michigan law provides no specific right or procedure for appraisal and retirement of the holdings of a stockholder dissenting from a railroad merger.

When application was filed with the Interstate Commerce Commission under § 5 of the Interstate Commerce Act as amended (49 U. S. C. § 5), for approval and authorization of the merger,[1] as well as for other relief,

[1] Section 5 as amended provides in part as follows:

"(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in sub-division (b)—

"(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for

appellants intervened and asked that body to determine, recognize and protect their asserted right to the full legal liquidation figure. The Commission approved the

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the ownership, management, and operation of the properties theretofore in separate ownership . . .

"(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or persons seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants, . . . and shall afford a reasonable opportunity for interested parties to be heard . . . If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable . . .

"(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect . . . upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory . . . ; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected . . . .

"(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest . . .

"(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof . . .

"(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under

merger and the merger terms, finding them just and reasonable as to each class of stockholders. However, it disclaimed jurisdiction to pass upon the further claims of the appellants asserted on the basis of their interpretation of Michigan law. It reviewed at some length the economic position of the stock. It recited that these shares had received no dividends since 1931 and that appellants' witnesses agreed that these stockholders could not expect to receive any dividends for many years, apart from the merger. The Commission also pointed out the deficit in operations of Pere Marquette for the first quarter of 1946 as contrasted with the net income of Chesapeake and Ohio, and concluded that "On the whole it would seem that the prospects of Pere Marquette stockholders for returns on their investments would be enhanced by the merger of their company into Chesapeake & Ohio." The

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applicable State law, in which case the number so required shall assent, of the vote of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under any State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its power under its corporate charter or under the laws of any State."

Commission did not question that the stockholders, on liquidation, dissolution or winding up of Pere Marquette, would be entitled to be paid in full the par value of their shares and accumulated dividends before any payment to holders of common stock. It did not undertake to determine the ultimate worth of these stocks in case of an actual liquidation, but it considered their present intrinsic value on a capitalized earnings basis, an actual yield basis, and its present market position and concluded: "Accordingly, considering Pere Marquette's investment according to its books, other property values, the company's history as to earnings, its future prospects, and the market appraisal of its stocks, all as set forth above, we find that as to the stockholders of both parties generally the proposed ratios of exchange, stock issues and assumptions of indebtedness, are just and reasonable."

The Commission then noted the contention of the appellants that as to them the terms were not just and reasonable, because they are deprived of contract rights under Michigan law, which they have not waived. It is contended that the Commission should not remit the dissenting stockholders to remedies in state courts as the Commission would thereby decline the jurisdiction conferred by § 5 and § 20a of the Act.[2] But the Commission considered that it was entrusted with authority to decide the public interest aspects of the merger of these transportation facilities and that it could not be expected to enter into the question of "compensation of dissenting stockholders on specified bases" before approval and merger. It thought that, having found the treatment of each class to be just and reasonable, it had done its full duty "when we make certain that all stockholders of the same class are to be treated alike." It declined to decide the Michigan law question as to what rights of dissenting

[2] For pertinent provisions of § 5 and § 20a see notes 1 and 15 respectively.

stockholders were, and whether the merger was equivalent to a liquidation, but said: "This does not mean that the Chesapeake & Ohio and the Pere Marquette do not remain free to settle controversies with dissenting stockholders through negotiation and litigation in the courts."

Taking into account the small percentage of the dissenting shares, the current assets position of the Chesapeake & Ohio, and the maximum possible cost to the merged company of the settlement of these claims on the basis most favorable to appellants, it considered that the company was amply able to bear "any probable expenditure of cash that it might be required to make in connection with the merger. Accordingly it appears that consummation of the merger will not involve a burden of excessive expenditure." The Commission thus left in a state of suspense, subject to further litigation or negotiation, these claims concerning the extent of the capital obligations of a constituent company, after examining them sufficiently to determine only that, however settled, they did not involve enough to affect the solvency of the new company or jeopardize its operations.

The Commission denied appellants' petition for rehearing and they filed suit in the United States District Court for the Eastern District of Virginia to set aside the order authorizing the merger. A court of three judges, convened as required by law,[3] sustained the Commission, 72 F. Supp. 560. Appellants bring to us[4] the question whether the Commission, in view of its authority over mergers, which is declared to be exclusive and plenary, could decline to determine just what the dissenting stockholders' legal rights were under the Michigan law and the Pere Marquette charter, and to recognize them in full by the terms of the merger.

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[3] 28 U. S. C. § 47.

[4] 28 U. S. C. § 47 (a); 28 U. S. C. § 345.

The disposition of appellants' claims, as well as the nature of the claims themselves, requires consideration of the relative function and authority of federal and state law in regulating and approving voluntary railroad mergers. The appellants contend that their share in the merged company is to be measured by, or their remedies as dissenters are to be found in, state law, but that the federal agency is bound to determine and apply that law. The Commission on the other hand refuses either finally to foreclose or to allow these claims. It apparently leaves it open to the state courts, or to the parties by negotiation, to add to the surviving carrier's capital obligations which the Commission has found to be just and reasonable, others founded only in state law and as to which it has made no such findings. We conclude that neither position is wholly consistent with the federal statutory plan for authorization and approval of mergers.

It is not for us to adjudicate the existence or the measure of any rights that Michigan law may confer upon dissenting stockholders. Neither the Commission nor this Court can make a plenary and exclusive decision as to what the law of a state may be, for the function of declaring and interpreting its own law is left to each state of the Union. But the effect of the state law in relation to a constitutional Act of Congress, in view of the constitutional provision that the latter shall be "the supreme law of the land," "laws of any state to the contrary notwithstanding," is for us to determine. Our first inquiry here, therefore, is whether the Interstate Commerce Act accords recognition to those state law rights, if any exist. To determine this federal question we assume, but do not decide, that Michigan law would consider this merger to be a liquidation, and would regard the recognition given to the common stock as entitling these dissenters to "full payment" in cash or its equiva-

lent for both the par value of their preferred shares and accrued unpaid dividends thereon. Assuming such to be their rights under the law of the State, we must decide whether approval of a railroad merger under the Transportation Act of 1940 [5] is conditioned upon observance of such state law rights or can be made by the Commission contingently subject to them. A resume of the history of that Act throws light on the problem dealt with by that legislation.

The basic railroad facilities of the United States were constructed under state authorization and restrictions by corporations whose powers and limitations were prescribed by state legislatures, or resulted from limitations on the states themselves. Construction in reference primarily to local or regional transportation needs created duplicating and competing facilities in some areas and provided inadequate ones in others. Expansion necessary to serve advancing national frontiers was stimulated by extensive subsidies from the Federal Government, largely in the form of land grants. But the stress and strain of World War I brought home to us that the railroads of the country did not function as a really national system of transportation. That crisis also made plain the confusions, inefficiencies, inadequacies and dangers to our national defense and economy flowing from the patchwork railroad pattern that local interests under local law had created.

The demand for an integrated, efficient and coordinated system of rail transport, equal to the needs of our national economy and defense, resulted in the Transportation Act of 1920.[6] In a series of decisions on particular problems, this Court defined the general purposes of that Act to be the establishment of a new federal railway pol-

[5] Act of September 18, 1940, 54 Stat. 898.
[6] Act of February 28, 1920, 41 Stat. 456.

icy [7] to insure adequate transportation service by means of securing a fair return on capital devoted to the service, restoration of impaired railroad credit, and regulation of rates, security issues, consolidations and mergers in the interest of the public. The tenor of all of these was to confirm the power and duty of the Interstate Commerce Commission, regardless of state law, to control rate and capital structures, physical make-up and relations between carriers, in the light of the public interest in an efficient national transportation system. *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563; *New England Divisions Case*, 261 U. S. 184; *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456; *Railroad Commission of California* v. *Southern Pacific R. Co.*, 264 U. S. 331; *Texas Pacific R. Co.* v. *Gulf, Colorado & Santa Fe R. Co.*, 270 U. S. 266.[8]

[7] "It is manifest . . . that the Act made a new departure . . ." Chief Justice Taft, in *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 585.

[8] In *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456, 478, in referring to the *Wisconsin* case, 257 U. S. 563, and the *New England Divisions Case*, 261 U. S. 184, the late Chief Justice said: "In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable and discriminatory rates against persons and localities. The new Act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged."

As a means to this end, the 1920 Act required [9] the Commission to prepare and adopt a plan for nation-wide consolidations of the railway properties of the country. It made this master plan the governing consideration in approving voluntary consolidations of railroads which were permitted only if in harmony with and in furtherance of the Commission's overall plans.[10] If they met that test, Congress provided that mergers could be consummated notwithstanding any restraint or prohibition by state authority.[11]

By 1940 it had become apparent that the ambitious nation-wide plan of consolidation was not bearing fruit. Various studies and investigations [12] led to the conclusion that it was a case where the best was an enemy of the good and waiting for the perfect official plan was defeating or postponing less ambitious but more attainable voluntary improvements. The Transportation Act of 1940 relieved the Commission of formulating a nation-wide plan of consolidations. Instead, it authorized approval by the Commission of carrier-initiated, voluntary plans of merger or consolidation if, subject to such terms, conditions and modifications as the Commission might prescribe, the proposed transactions met with certain tests of public interest, justice and reasonableness, in which case they should become effective regardless of state authority.[13] The Act does not specify every consideration to which the Commission must give weight in determining whether or not any plan meets the tests. Section 5 (2) provides only that "among others," the Commission

[9] § 407 (4).

[10] § 407 (6) (a).

[11] § 407 (8).

[12] See, for example, report and recommendations by the President's Committee of Six, appointed September 20, 1938, whose report dated December 23, 1938, is considered part of the legislative history of the Transportation Act of 1940.

[13] See note 1, *supra*.

shall consider the effect upon adequate transportation service, the effect of inclusion or failure to include other railroads, total fixed charges, and the interests of the carrier employees affected. This Court has recently and unanimously said in reference to this Act, "Congress has long made the maintenance and development of an economical and effcient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind." *Seaboard Air Line R. Co.* v. *Daniel*, 333 U. S. 118."[14]

So reading the legislation relevant to this merger, we find that approval of a voluntary railroad merger which is within the scope of the Act is dependent upon three, and upon only three, considerations: First, a finding that it "will be consistent with the public interest." (§ 5 (2) (b).) Second, a finding that, subject to any modification made by the Commission, it is "just and reasonable." (§ 5 (2) (b).) Third, assent of a "majority, unless a different vote is required under applicable state law, in which

[14] The Act itself included a statement of the "National Transportation Policy" in these terms: "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

case the number so required shall assent, of the votes of the holders of shares entitled to vote." (§ 5 (11).) When these conditions have been complied with, the Commission-approved transaction goes into effect without need for invoking any approval under state authority, and the parties are relieved of "restraints, limitations and prohibitions of law, federal, state or municipal, insofar as may be necessary to enable them to carry into effect the transactions so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission and to hold, maintain and operate any properties and exercise any control or franchise acquired through such transaction." (§ 5 (11).)

The Commission, under this Act as well as the Act of 1920, was also given complete control of the capital structure to result from a merger.[15] The carrier, even if per-

[15] Repeated recommendations of the Commission that the federal government occupy the field of regulation of railroad security issues and assumption of obligations were followed in 1920 by addition of § 20a to the Interstate Commerce Act (§ 439 of the Transportation Act of 1920, 41 Stat. 494).

As early as 1907 the Commission had stated that "the time has come when some reasonable regulation should be imposed upon the issuance of securities by railways engaged in interstate commerce." 12 I. C. C. 277, 306. This recommendation was renewed in the Commission's annual report for 1907, p. 24, and in every succeeding annual report up to and including 1919. The Commission incorporated in the 1919 report the statement concerning recommended legislation it had submitted to the Senate Interstate Commerce Committee, which included a recommendation for regulation of security issues.

House Report No. 456, 66th Cong., 1st Sess. (November 10, 1919), said with respect to the section which later became § 20a: ". . . The enactment of the pending bill will put the control over stock and bond issues exclusively in the hands of the Federal Government and will result in uniformity and greater promptness of action."

Section 20a as enacted in 1920 remained unchanged by the Transportation Act of 1940 and provides in part as follows:

"(2) . . . it shall be unlawful for any carrier to issue any share

mitted by state law which created it, may issue no stock, bond or evidence of indebtedness without approval. It may assume no obligation in respect of the securities of another person or corporation except with approval. And the approval is to be given only on a finding that it "(a) is for some lawful object within its corporate purposes, and compatible with the public interest, which

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of" capital stock or any bond or other evidence of interest in or indebtedness of the carrier . . . or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose . . .

"(6) Upon receipt of any such application for authority the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the Commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceedings. The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority . . .

"(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and obligations or liabilities in accordance with the provisions of this section without securing approval other than as herein specified . . .

is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose." 49 U. S. C. § 20a (2).

The jurisdiction of the Commission under both § 5 and § 20a is made plenary and exclusive and independent of all other state or federal authority. § 5 (11);[16] § 20a (7).[17]

The Commission, as we have seen, has found that the liabilities asserted by appellants, if settled by litigation or negotiation, will not impair the carrier's ability to perform its service, but it has not found the assumption of such liabilities to be compatible with the public interest under § 5 and § 20a. Indeed, since these claims exceed what the Commission has found to be just and reasonable, it could hardly find that assumption of such claims would be compatible with the public interest.

It appears to us inconsistent with the Interstate Commerce Act[18] for the Commission to leave claims growing

[16] For text of § 5 (11) see note 1.

[17] For text of § 20a (7) see note 15.

[18] In an early case (*Pittsburgh & W. Va. R. Co.* v. *Interstate Commerce Commission*, 293 F. 1001, appeal dismissed 266 U. S. 640) in which the constitutionality of § 20a had been upheld, the Court said: "If a 'fair return on capital devoted to the transportation service' [*New England Divisions Case*, 261 U. S. 184, 189] was to be insured the railway companies, and at the same time proper service and equitable rates accorded the public, the supervision of the issuance of stock, the incurring of bonded indebtedness, the extension and consolidation of railway lines, becomes of utmost importance. Without this power to supervise the issue of stocks and bonds, and thus limit the dividend and interest obligations of the carriers, as well as the expenditures in extensions and improvements, the fixing of adequate rates to insure a just return to the carrier, and at the same time equitable protection to the public, would be impossible . . ."

out of the capital structure of one of the constituent companies to be added to the obligations of the surviving carrier, contingent upon the decision of some other tribunal or agreement of the parties themselves. We think that the Commission must pass upon and approve all capital liabilities which the merged company will assume or discharge as a result of merger. If some greater amount than that specified in the agreement is to be allowed to any class of stockholders, it must either deplete the cash or inflate the liabilities or capital issues of the new company. It may be that in this case the merged company will be strong enough to carry this burden and still perform its public service. But that is not the sole purpose of the supervision provided by statute. It is also in the public interest that no capitalization or indebtedness be carried over except that which meets the test of the Act in all other respects. We think the Commission was in error in assuming that it did not have, or was at liberty to renounce or delegate, power finally to settle the amount of capital liabilities of the new company and the proportion or amount thereof which each class of stockholders should receive on account of its contributions to the new entity.

We think it is equally clear that the Commission must look for standards in passing on a voluntary merger only to the Interstate Commerce Act. In matters within its scope it is the supreme law of the land. Its purpose to bring within its scope everything pertaining to the capital structures of such mergers could hardly be made more plain. Indeed, the very fact on which appellants rely heavily, that the Commission's jurisdiction is "plenary" and "exclusive," argues with equal force that federal law is also plenary and exclusive. The Commission likely would not and probably could not be given plenary and exclusive jurisdiction to interpret and apply any state's law. Whatever of rights the appellants ask the Commis-

sion to assert must be founded on federal, not on state, law.

Apart from meeting the test of the public interest, the merger terms, as to stockholders, must be found to be just and reasonable. These terms would be largely meaningless to the stockholders if their interests were ultimately to be settled by reference to provisions of corporate charters and of state laws. Such charters and laws usually have been drawn on assumptions that time and experience have unsettled. Public regulation is not obliged and we cannot lightly assume it is intended to restore values, even if promised by charter terms, if they have already been lost through the operation of economic forces. *Cf. Market Street R. Co.* v. *Commission*, 324 U. S. 548. In appraising a stockholder's position in a merger as to justice and reasonableness, it is not the promise that a charter made to him but the current worth of that promise that governs, it is not what he once put into a constituent company but what value he is contributing to the merger that is to be made good.

In construing the words "fair and equitable" in a federal statute of very similar purposes, we have held that although the full priority rule applies in liquidation of a solvent holding company pursuant to a federal statute, the priority is satisfied by giving each class the full economic equivalent of what they presently hold, and that, as a matter of federal law, liquidation preferences provided by the charter do not apply. We said that, although the company was in fact being liquidated in compliance with an administrative order, the rights of the stockholders could be valued "on the basis of a going business and not as though a liquidation was taking place." Consequently the liquidation preferences were only one factor in valuation rather than determinative of amounts payable. *Otis & Co.* v. *Securities & Exchange Commission*, 323 U. S. 624.

The appellants here, although the enterprise is to continue, insist on a valuation according to the letter of the charter. By this method the longer their stock is in default of dividends or earnings, the greater interest it would have in the merged properties if the common stock was to be recognized at all. The Commission, however, did not consider that a long continued default and the prospect of further default added greatly to the present intrinsic or market value of the stock in exchange. Its measuring rod was an economic rather than a legalistic one. The Commission considered the stock's past yield, present market value, and future prospects. It found that, all things considered, the merger terms gave to these appellants in new stock the fair economic equivalent of what they already held. It considered the deal just and reasonable on an exchange basis for a continuing enterprise. But it did not undertake to say whether, under the letter of their charter as construed under the law of Michigan, the preferred stockholders may not have a contract that would exact more than an economic equivalent.

Since the federal law clearly contemplates merger as a step in continuing the enterprise, it follows that what Michigan law might give these dissenters on a winding-up or liquidation is irrelevant, except insofar as it may be reflected in current values for which they are entitled to an equivalent. It would be inconsistent to allow state law to apply a liquidation basis to what federal law designates as a basis for continued public service. Federal law requires that merger terms be just and reasonable to all groups of stockholders, in contemplation of the continued use of their capital in the public calling to which it has been dedicated. Congress has made no provision by which minority stockholders, dissatisfied with a proposed railroad merger, may block it or compel retirement of their capital, as statutes often permit to be done in the

case of private corporations where the public interest is not much concerned with its effect on the enterprise. And since Congress dealt with the subject of stockholders' consent, its failure to provide for withdrawal of non-consenting capital cannot be considered an oversight to be supplied by us. A part of the capital dedicated to a railroad enterprise cannot withdraw itself without authorization any more than all of the capital can withdraw itself and abandon the railroad without approval. It must submit to regulations and to readjustments in the public interest on just and reasonable terms.

In determining whether each class of stockholder receives an equivalent of what it turns in, the Commission, of course, is under a duty to see that minority interests are protected, especially when there is an absence of arm's length bargaining or the terms of the merger have been imposed by management interests adverse to any class of stockholders. The Commission indicates both awareness and discharge of this duty in this case. Its finding that this plan is just and reasonable is not challenged here except on the basis of Michigan law. When stockholders are given what it is just and reasonable they should have, the Interstate Commerce Act does not permit state law to impose greater obligations on the financial structure of the merging railroads with consequent increased calls upon their assets or earning capacity.

We therefore hold that no rights alleged to have been granted to dissenting stockholders by state law provision concerning liquidation survive the merger agreement approved by the requisite number of stockholders and approved by the Commission as just and reasonable. Any such rights are, as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable. In making that determination, those rights are to be considered to the extent that they may affect intrinsic or

market values. While the Commission has found that what the appellants are given in this plan is just and reasonable, the record indicates that it may have declined to consider these claims, even if they are found to have some effect on the intrinsic value of the stock, because it thought it lacked jurisdiction. Under these circumstances, we cannot be sure that in arriving at its conclusion that the plan was just and reasonable it did not exclude some factors that it should consider under the views set out in this opinion. We therefore reverse the judgment below and remand the case to the Commission for reconsideration under the principles herein expressed.

Reversed and remanded.

MR. JUSTICE REED took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 258.—October Term, 1947.

Albert E. Schwabacher, Albert E. Schwabacher, Jr., James M. Schwabacher et al., Appellants, *v.* The United States of America, Interstate Commerce Commission et al.	Appeal From the District Court of the United States for the Eastern District of Virginia.

[May 3, 1948.]

Mr. Justice Frankfurter, dissenting.

The railroads of this country are operated by not less than 693 corporations. These exist by virtue of charters granted by the several States,[1] the laws of which govern their internal affairs, and, more particularly, the rights and liabilities of their stockholders. The Chesapeake & Ohio is chartered by Virginia, the Pere Marquette by Michigan. The laws of Virginia and Michigan respectively determine the conditions under which each may combine with other corporations. The votes of sufficient stockholders of these two corporations to satisfy the laws of their respective States were in favor of a voluntary agreement for the absorption of the Pere Marquette by the Chesapeake & Ohio. To consummate this agreement, however, required the authorization of the Interstate Commerce Commission under the terms of § 5 (2) of the Interstate Commerce Act, as amended by the

[1] According to the annual reports of Class I and Class II carriers on file with the Interstate Commerce Commission there is at present only one operating carrier chartered by Congress: the Texas and Pacific Railway. See the Act of March 3, 1871, 16 Stat. 573, as amended by the Act of February 9, 1923, 42 Stat. 1223.

Transportation Act of 1940. The agreement provided, in short, that the total outstanding securities of the Pere Marquette, amounting to 450,460 shares of common, 124,290 of cumulative preferred, and 112,000 of prior preference, were to be exchanged for 211,429.4 shares of Chesapeake & Ohio common and 312,272.2 preferred. All but 9% of the security holders of the Pere Marquette cumulative preferred assented to this arrangement. The appellants, holding less than 2% of that class of stock, stood on their rights under Michigan law, claiming that they were entitled to the dividends unpaid since 1931, amounting to $72.50 per share.

The Interstate Commerce Commission approved the proposed merger but refused to pass on the legal claims thus asserted under Michigan law by the appellants. The Commission ruled that it was not called upon to pass upon individual rights against a merged road when the potential recognition of such rights, under appropriate State law, could not affect the public interest which it is requisite for the Commission to safeguard before authorizing a merger. For the Commission held that, even if the appellants' claims were sustained by Michigan law, the amount involved would in nowise affect either the security structure or the cash position of the Chesapeake & Ohio.

The Chesapeake & Ohio is capitalized at $191,433,919. An additional $28,949,745 of stock is to be issued, under the merger plan, for Pere Marquette shareholders, making a total capitalization for the Chesapeake & Ohio, after merger, of $220,383,595. The appellants own 2,100 shares of Pere Marquette cumulative preferred. The merger agreement offered them securities found by the Commission to be worth $111.60 per share, or $234,360. If their claim for full book value of $172.50 per share were honored, it would amount to $362,250. This contingent liability of $127,890, the Commission concluded, did not

affect its finding as to the soundness, from the point of view of the "public interest," of the financial structure devised and approved for this merger. The Commission further pointed out that even if 2% of each class of Pere Marquette stock—the maximum number contemplated by the agreement—were to refuse to participate, the difference between the value of the Chesapeake & Ohio shares offered to them and the book value of their Pere Marquette shares could, if required, readily be absorbed by a soundly based quarter-billion-dollar carrier.

Both the Chesapeake & Ohio and the Interstate Commerce Commission here urge this view of the law. The Court, however, reads the Commission's duty under the Act quite differently, although in reaching its conclusion the Commission applied its settled administrative practice.

I think that the Commission was right in the view it took of its powers and duties. Even if the matter were doubtful, the Court does not seem to me to give to the Commission's construction of the Act the weight to be accorded its experienced judgment, which we held in *United States* v. *American Trucking Associations*, 310 U. S. 534, 549, to be required. Since the Commission disclaims rather than asserts a power, there is all the more reason to feel assured of its disinterestedness and to resolve ambiguity in favor of its choice of construction.

Until the Transportation Act of 1920, carriers, while subject to the Sherman law, could combine without leave of the Interstate Commerce Commission. See *Northern Securities Co.* v. *United States*, 193 U. S. 197. The Transportation Act of 1920 required the authorization of the Commission for acquisition by one carrier of the control over another, to the extent defined by § 5 of the Interstate Commerce Act, as amended. By the Transportation Act of 1940, the voluntary merger of the properties of two or more carriers into one corporation was

sanctioned, subject, however, to the scrutiny of the Interstate Commerce Commission for the due protection of the "public interest." Congress defined with particularity the factors that constituted the "public interest" put into the Commission's keeping.

The Court now holds that State law governing the relations between State-chartered carriers and their stockholders is impliedly supplanted as to those who have refused to assent to a merger, even when the Commission finds that to leave the adjudication of those rights to the law that created them in nowise touches the "public interest" that is the sole condition to carrying out a wholly voluntary arrangement, and even though such a voluntary arrangement by itself could not affect the rights of dissenters. I have no doubt that Congress could compel the unification of railroad properties theretofore in separate ownership and in so doing override State-created legal rights of stockholders of the constituent carriers. In the case of financially embarrassed carriers, Congress, in the exercise of its bankruptcy powers, has empowered the Interstate Commerce Commission to formulate plans of reorganization, the terms of which, if fair and equitable, may override State-created legal rights of stockholders who do not assent. In the interests of a more efficient national railroad system, Congress may accomplish like results under the Commerce Clause. But that is precisely what Congress has refused to do. It was besought to eliminate the waste and inefficiencies due to the congeries of corporate instrumentalities through which the railroads of the United States operate, by providing for compulsory consolidations. It was also besought to do away with the complexities and confusion resulting from State corporations conducting the country's interstate railroad business, by requiring federal incorporation. Congress rejected both demands. See H. R. Rep. No. 650, 66th Cong., 2d Sess., pp. 63–64. It

left mergers of separate railroad properties into larger units to the will of their private owners, merely lodging a veto power in the Commission if such voluntary mergers run counter to the defined public interest. And Congress explicitly negatived the possibility of construing such supervision by the Commission as the creation, "directly or indirectly, of a federal corporation."

The Commission was charged with seeing to it that the very limited requirements of § 5 (2) were observed, and to that end was given "exclusive and plenary" authority. § 5 (11). The purpose was to authorize a voluntary arrangement, to sanction an agreement, not to formulate a plan and to coerce its adoption, as is true of § 77. The law specifically enumerates the requirements that constitute the "public interest" which the voluntary agreement must satisfy to secure the Commission's approval. These are: the effect of the proposal on the public transportation service; the effect of including or failing to include other railroads in the plan; the resulting fixed charges; and the interest of the carrier employees affected. These factors have no bearing on whether the appellants' claim should be allowed. The great difference between these requirements and the detailed and comprehensive provisions of § 77, 11 U. S. C. § 205, carries a sharp legal contrast between the authorization which Congress required for voluntary mergers and the coercion of an imposed plan of reorganization in the case of insolvent roads.

Appropriate accommodation between federal and State interests in the construction of the Interstate Commerce Act is needlessly sacrificed by adding, to the detailed provisions whereby the Commission is merely authorized to approve voluntary mergers, an implied abrogation of State law in no respect inconsistent with such limited power of authorization, since the Commission found that survival of a claim under State law would not impinge

upon "the public interest." It ignores the salutory principle of construction, so strikingly illustrated by the *Los Angeles Terminal Cases* from which it was drawn, "that the Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the State of its authority as to matters not covered by the federal legislation is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the State." *Atchison, Topeka & Santa Fe R. Co.* v. *Railroad Commission*, 283 U. S. 380, 392–93. See also *Palmer* v. *Massachusetts*, 308 U. S. 79.

Since it is needless, it is undesirable to draw an implication so destructive of State law from the Congressional scheme for allowing voluntary mergers. In fact, Congress has manifested not an intention to abrogate State law where the Commission finds no collision with the public interest; it has manifested an intention not to abrogate State law unless it interferes with carrying out an approved merger. Thus, it made the necessary proportion of assenting stockholders dependent on State law. It hardly seems congruous to provide that State law should determine when the opposition of stockholders may prevent a voluntary merger, but should have no effect on the rights which such dissenters have under State law, even where the Interstate Commerce Commission finds no national interest involved in determining and enforcing such rights. Again, while § 5 (11) relieves parties to an approved merger from the restraints of other laws, "Federal, State, or municipal," it does so only "insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission . . . ." This paragraph further contains an expressed disclaimer of authorization of federal incorporation. The prohibition of federal incorporation surely im-

plied a desire to retain to the fullest possible extent the ties between the States and their chartered corporations. One of the vital consequences of incorporation in a given State is the subjection of the relationship between stockholders and their corporation to the law of that State except insofar as federal law unmistakably overrides it.

The considerations relevant to voluntary railroad mergers sharply differ from those that control liquidations and reorganizations under § 77 of the Bankruptcy Act. (See also Railroad Reorganization Act, Pub. L. No. 478, 80th Cong., 2d Sess., April 9, 1948.) A railroad in reorganization is administered by a bankruptcy court which has control of all its assets. The power of dealing with all claims is inevitably concentrated in that court. In merger proceedings, however, there is no obstacle to the practice pursued by the Commission of deciding what is "just and reasonable" and in "the public interest" as to each class of securities, while at the same time permitting any dissenter to stand on the terms of the particular stock issue, leaving to State law to determine what those terms are, provided only that the function of the new corporation, as part of an economic and efficient national railroad system, would not be affected by allowance of such claims. The Commission has here ruled that the appellants assert an unliquidated claim against the Pere Marquette sufficiently negligible not to affect the financial position of its successor, even if it be ultimately allowed in full. I fail to see that the effect on the Chesapeake & Ohio will be any different than that of negligence claims for the same amount. Every operating railroad is likely to have such claims outstanding against it at all times. Their existence does not interfere with the consummation of a voluntary merger. A reasonable amount of contingent obligations may easily be allowed for. In any event, the determination whether or not eventual liability for contingent

claims of dissenting stockholders are such as to affect "the public interest" required to be protected by authorization of a proposed merger is precisely the function of the Interstate Commerce Commission and should appropriately be left to the exercise of its informed discretion.

The Commission has control, under § 20a, over securities, which of course it does not have over a contingent demand for compensation for loss resulting from negligence. But differences in the foundation of contingent claims do not determine their relevance to the Commission's authority in approving a merger and in leaving the determination of such claims to State law. While the rights asserted by the appellants arise out of their holding of securities, they may be paid off in cash, if their claims turn out to be well founded, and need not be satisfied out of the securities of the successor corporation.

Neither what Congress has written, nor what it has implied by the purpose underlying what it has written, persuades me that a power which the Commission itself has vigorously disclaimed it must now exercise. The Commission has consistently declined to adjudicate as a matter of State law—or what is now found to be federal law—contested claims not deemed relevant to its determination of "the public interest." *E. g., Sullivan-Purchase-Service Freight Line, Inc.*, 38 M. C. C. 621; *Jessup-Control-Safeway Trails, Inc.*, 39 M. C. C. 233, 241; *Lee-Control; Carolina M. Exp. Lines, Inc.—Lease and Purchase—Reed*, 40 M. C. C. 405, 407. See also *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 26–27; *Cleveland, Cincinnati, Chicago & St. Louis R. Co.* v. *United States*, 275 U. S. 404, 414.

The Court is holding, in essence, that while State law governs the rights of railroad stockholders before and after voluntary merger proceedings it is supplanted during such proceedings. In thus thrusting upon the Commission a

jurisdiction which it itself has rejected, the Court is depriving the States of a measure of control over their own corporations when this is not required by a fair reading of the Transportation Act, and although the survival of such State law does not interfere with the national interest as found by the agency selected by Congress for determining that interest.

I would affirm the judgment.

THE CHIEF JUSTICE and MR. JUSTICE BURTON join in this dissent.